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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. ~~164~~ 12

HY GOLDBAUM, GEORGE CAPRI, and EDWARD COOKE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No.

HY GOLDBAUM, GEORGE CAPRI, and EDWARD COOKE,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners, Hy Goldbaum, George Capri and Edward Cooke, pray that a writ of certiorari issue to review the judgment of the United States Court

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of Appeals for the Ninth Circuit, affirming petitioners' convictions of income tax evasion, the making of a false partnership return and conspiracy to commit those offenses.

OPINION BELOW.

The opinion of the Court of Appeals (V. 6, p. 1149)[1] is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 13, 1953 (V. 6, p. 1158). Petition for rehearing was denied on May 13, 1953 (V. 6, p. 1159) and the mandate of the Court of Appeals was stayed until June 13, 1953. On June 1, 1953, by order of Mr. Justice Douglas, the time within which to file this petition for a writ of certiorari was extended to and including July 13, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rule 37 (b) (2), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

1. Whether, in a tax evasion prosecution, the burden of proof is upon the defendant to establish accounts payable and receivable which were within the

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[1]The record consists of nine numbered volumes. References are designated by volume and page number.

knowledge of the prosecution, but not included by it in establishing the net worth of the defendant.

2. Whether there was a variance between the theory of the Government as shown in the indictment and as announced in its bill of particulars and the proof, the result of which was to convict the petitioners as to Count 13 of the indictment upon a charge for which they were not indicted, and for the defense of which they had no opportunity to prepare.

3. Whether the extrajudicial admissions of one defendant are sufficient to establish the falsity of a partnership tax return, upon a charge of filing such a false return.

STATUTES INVOLVED.

The applicable statutes are as follows:

United States Code, Title 18, Section 371 (formerly 18 U. S. C., Sec. 88, (1946 Ed.)).

> "§371. *Conspiracy to commit offense or to defraud United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both * * *"

United States Code, Title 26, Section 145(b).

> "§145(b). *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person

required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

United States Code, Title 26, Section 3809.

"§3809. *Verification of returns; penalties of perjury.*

(a) *Penalties.* Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

STATEMENT.

Petitioners were defendants under an indictment containing thirteen counts (V. 1, p. 2) and upon trial before the United States District Court for the Southern District of California, Central Division, sitting without a jury, were convicted upon all excepts counts

11 and 12 (V. 1, p. 20). Of those upon which they were found guilty, nine charged income tax evasion (U. S. C., Title 26, Section 145 (b)); one charged the making of a false partnership return (U. S. C., Title 26, Section 3809); and one charged a conspiracy to commit such offenses (U.S.C., Title 18, Section 371). The judgment was affirmed by the United States Court of Appeals for the Ninth Circuit on April 13, 1953 (V. 1, p. 1158). Petition for rehearing was denied (V. 1, p. 1159).

At the trial the Government proved that in May, 1945, petitioners formed a partnership in Los Angeles, California, and conducted a commission business in wagering on horse-racing, operating under the name of "Golden News Service". In January 1949, the business was removed to Las Vegas, Nevada, where it was conducted under the name of "Flamingo Commissioners". It continued to operate until 1951. The partnership acted as a broker which received wagers from various persons called "bettors" which were "laid off" to persons known as "takers". Petitioners were thus the intermediaries who established the contact between the bettor and the taker. If the horse won, the taker would forward the amount won to petitioners who in turn would pay the winnings to the bettor. If the horse lost, the bettor would forward the amount wagered to petitioners who would then deduct a commission of from 2½% to 5% and forward the balance to the taker. Petitioners received no commission if the horse won.

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Count one (V. 1, p. 2) charged petitioners with conspiracy to defeat and evade income taxes for the years 1947 to 1949; counts two through ten charged that during 1945, 1946 and 1947 each petitioner attempted to evade his individual income tax and each aided and abetted the others in so doing. Counts eleven, twelve and thirteen charged that petitioners filed false partnership returns for 1947, 1948 and 1949. Petitioners were acquitted on counts eleven and twelve, and convicted on all other counts.

The Government experienced considerable difficulty in making proof of the amount of the income of petitioners for the years 1945, 1946 and 1947 to support counts one to ten of the indictment, and much of petitioners' and respondent's briefs in the Court of Appeals were devoted to the question of the sufficiency of the evidence to support counts one to ten. This question was not considered by the Court of Appeals in affirming the judgment, that Court holding "that the court properly found the appellants (petitioners) guilty of the charges upon count 13, and since the evidence was sufficient to sustain a conviction upon that count, and since the sentences imposed upon the other counts ran concurrently, it is not necessary to inquire as to the sufficiency of the evidence under the other counts" (V. 6, p. 1157). It would seem that the Court of Appeals recognized the fatal deficiencies in evidence to sustain the convictions upon Counts one to ten, supported, as it was, only by net worth statements which failed to give consideration to ac-

counts payable and accounts receivable known to the Government (V. 2, p. 240; V. 4, pp. 576, 584, 585, 620-623, 826, 827; V. 5, pp. 889-892, 895, 896, 898, 899-913, 918-923, 935-946, 948, 1012, 1015).

The proof relied upon to support Count 13: when petitioners moved to Nevada, they were subject to Nevada state tax upon their business. To ascertain the amount of tax due, periodic examinations were made of their records. The state auditor found that included in the record of the "bettors" was a combination or syndicate, designated on the records as "GN", having an interest in the syndicate of 45%. For the period covered by the records the gambling profits were $64,638.25 of which the share of "GN" was $29,060.75 (V. 2, pp. 144-150). No portion of this profit was included in the 1949 partnership return of petitioners. The Nevada state auditor testified that petitioner Cooke informed him that the "GN" reflected on the sheets was the Golden News Service and it was the trade name used by petitioners for their operations in California (V. 2, pp. 146, 147) but that he had no interest in the combination (V. 2, p. 187). While there was evidence that the Nevada partnership was the same which had done business in California,[2] the symbols "GN" stood for petitioners Goldbaum and Capri who were betting independently of the partnership (V. 2, p. 188). The evidence upon which petitioners were convicted upon counts one to ten was predicated upon net worth

[2]In fact, this was conceded by petitioners (V. 4, pp. 740, 741).

statements of the partnership (Exhibit 103, V. 7, p. 28) and of the individual petitioners (Exhibits 105, 106, 107, V. 7, p. 28). The nature of the business makes obvious the fact that large amounts of money were involved and that in most instances the result of the transactions was that accounts payable and receivable were outstanding at all times (V. 5, p. 936). The Government made no offort to ascertain the amounts owed to or by the partnership to other betting commissioners, although many of them and their records of account were examined by the Bureau agents (V. 2, p. 240; V. 4, pp. 576, 584, 585, 620-623, 826, 827; V. 5, pp. 889-892, 895, 896, 898, 899-913, 918-923, 935-946, 948, 1012, 1015). Even where evidences of partnership accounts receivable and payable were found, these were not included in the net worth statements of the partnership (V. 2, p. 240; V. 4, p. 576; V. 5, pp. 903, 904). Nor was effect given to other debts of the partnership (V. 4, p. 592; V. 5, pp. 905, 909).

ARGUMENT.

1. Petitioners' conviction upon Counts one to ten was upon alleged tax deficiencies sought to be established by the so-called "net worth" method, that is to say, that petitioners net worth had increased during the years in question in amounts greater than reported income for those periods. In establishing net worth the Government failed to give consideration

to accounts payable and receivable, known to Government agents. Further, the very nature of petitioners' business showed that moneys in bank were obviously held for transmission to "bettors" and "takers".

It was apparently the view of the Trial Court[3] that, in these circumstances, the Government's proof of net worth should stand subject to explanation by petitioners. A proper evaluation of the significance of this results in a rather surprising rule that the burden of proving his net worth shifts to the taxpayer.

Decisions of some Courts of Appeal[4] appear to misconstrue the effect of *United States v. Johnson*, 319 U.S. 503. These courts hold that where some discrepancies between the taxpayer's return and his actual income are indicated, the burden of proof is upon the taxpayer to make explanation. These are at odds with others[5] which hold that when the Government relies on increased net worth it must produce evidence that excludes all other possible available sources from which the additional funds could have been derived. This rule was limited in *Bell v. United States*, supra note 4, *Schuerman v. United States*, supra note 4, and *Brodella v. United States*, supra note

[3]The Court of Appeals did not pass upon this question.

[4]*Bell v. U.S.*, 185 F. 2d 302 (CCA 4); *Schuerman v. U.S.*, 174 F. 2d 397 (CCA 8); *Brodella v. U.S.*, 184 F. 2d 823 (CCA 6); *Graves v. U.S.*, 191 F. 2d 579 (CCA 10).

[5]*U.S. v. Fenwick*, 177 F. 2d 488 (CCA 7); *Bryan v. U.S.*, 175 F. 2d 223 (CCA 5); *U.S. v. Caserta*, 199 F. 2d 905 (CCA 3). See also *Chapman v. U.S.*, 168 F. 2d 997 (CCA 7); *U.S. v. Venuto*, 182 F. 2d 519 (CCA 3).

4, the courts there being of the view that the rule of *United States v. Fenwick,* supra note 5, and *Bryan v. United States,* supra note 5, would impose an "impossible burden of proof" upon the Government. But here the limitation has no application; here the Government agents had knowledge of accounts receivable and payable. In *Remmer v. United States* (CCA 9) decided May 28, 1953, the Court of Appeals questioned the "vitality" of the *Fenwick* case, supra note 5.

The effect of the decision of the Court of Appeals in the present case, agreeing as it does with the rule in the Fourth, Sixth, Eighth and Tenth Circuits, is in conflict with the pronouncements of the Third, Fifth and Seventh Circuits.

The holding here and in the Fourth, Sixth and Eighth Circuits disregards the presumption of innocence in holding that there is a duty on the part of a defendant to take the witness stand, or to call witnesses on his behalf, to explain a disparity between his reported income and such income as calculated by Government agents.

2. Count 13 of the indictment charged that the partnership return for 1949 was false in that "the return disclosed that the partnership had gross receipts * * * of $136,338.50, that the total assets at the beginning of the taxable year, 1949, were none, and that the total assets at the end of the taxable year, 1949, were none; whereas, in truth * * * the partnership had gross receipts * * * in the sum of at least $3,685,469.75, total assets at the beginning of

the taxable year, 1949, were at least $47,980.98, and total assets at the end of the taxable year, 1949, were at least $48,256.46". The bill of particulars furnished by the Government (V. 7, p. 56) stated merely that the gross receipts figure of $3,685,469.75 for 1949 alleged in count thirteen was derived from petitioners' books and records. The theory of the prosecution was that petitioners made return under "gross receipts" of only the gross commissions earned and not the total of the moneys passing through the business. However, at the trial, when it became apparent that the Court would not sustain the prosecution theory that petitioners were required to make return of all of the money received from "bettors" on behalf of the "takers" and vice versa (V. 2, p. 64),[6] the prosecution theory changed to cover a transaction entirely separate and distinct from its original position as disclosed by the indictment and bill of particulars—that is, petitioners had, in combination with others, engaged in betting on horses in April, 1949, and won $29,060.75 which was omitted from the partnership return.[7] When this change in theory became evident, petitioners' counsel objected thereto as constituting a prejudicial variance (V. 4, pp. 671-674).

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[6]During the trial and at its conclusion, the Trial Court clearly indicated that it did not believe that an offense was involved in the "gross receipts" or "assets" theory and acquitted on counts 11 and 12 (V. 5, p. 1109; V. 7, p. 136).

[7]The only evidence as to Cooke was his denial that he participated in the syndicate (V. 2, p. 187).

Nor was any reference made to this transaction in the Government's opening statement other than a vague reference to "gambling activities of the usual bookmaking sorts". (V. 2, p. 8).

That the transaction proved was a different one from that charged is obvious; that petitioners were taken by surprise and had no opportunity to refute the charge is likewise obvious. The present case falls clearly within the rule of *Berger v. United States,* 295 U.S. 78.

3. The offense of filing a false return lies primarily in its falsity. Count thirteen charged petitioners with filing a false partnership return. The proof that the unreported income was income of the petitioners' partnership consisted only of statements of petitioner Cooke that the symbol "GN" was the Golden News Service. Based upon this, the Trial Court attributed the gambling winnings of "GN" to petitioners as a partnership.

To justify conviction there must be proof exclusive of any express or implied extrajudicial admission of a defendant that the defendant falsified an income tax return. *United States v. Fenwick,* supra note 5; *Chapman v. United States,* supra note 5; *Gleckman v. United States,* 80 F. 2d 394 (CCA 8); *United States v. Miro,* 60 F. 2d 58 (CCA 2); *O'Brien v. United States,* 51 F. 2d 193 (CCA 7).

There was no *direct* proof that petitioners received partnership income not reported in their partnership return for 1949, nor was there circumstantial

evidence. The sole and only evidence that the gambling gains by the members of the syndicate designated "GN" was income of petitioners was the extrajudicial statement of the petitioner Cooke.

The conviction cannot stand since there was no proof of the *corpus delicti*, the existence of which cannot be presumed or established by an extrajudicial admission. The Government must, by *competent* evidence, prove beyond a reasonable doubt that the crime charged has actually been committed. *Pines v. United States*, 123 F. 2d 825 (CCA 8); *Forte v. United States*, 94 F. 2d 236 (CCA DC); *Gardner v. United States*, 261 F. 910 (CCA 9).

CONCLUSION.

For the reasons set forth, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated, Washington, D. C.,
June 24, 1953.

IRVIN GOLDSTEIN,
Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 164

HY GOLDBAUM, GEORGE CAPRI, AND EDWARD COOKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the District Judge's oral opinion announcing his decision (R. 1136-1143)[1] nor his writ-

[1] The record consists of nine numbered volumes. Volumes II through VI contain the transcript of the trial proceedings and the proceedings in the Court of Appeals. The pagination runs from 1 to 1160. References to these volumes will be designated "R." Volume I contains the formal District Court record. Volumes VII, VIII and IX are the briefs and appendices filed in the Court of Appeals. References to Volumes I, VII, VIII and IX, each of which is paginated separately, will

ten findings of fact (Vol. I, pp. 23-32) have been reported. The opinion of the Court of Appeals (R. 1149-1157) is reported at 204 F. 2d 74.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1953 (R. 1158), and the petition for rehearing was denied May 14, 1953 (R. 1159). On May 30, 1953, by order of Mr. Justice Douglas, the time for filing the petition for a writ of certiorari was extended to July 13, 1953. The petition was filed July 6, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the Government, in determining the taxable income of taxpayers (whose primary records have been destroyed) by computing the annual increases in their net worth, was required to include accounts receivable and accounts payable in the net worth computation, where the taxpayers had kept their books and filed their returns, not on an accrual basis, but on a cash basis.

2. Whether there was a material variance between the allegations of Count Thirteen, which charged petitioners with submitting a false part-

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be designated by volume and by page, *e.g.*, "Vol. I, p. 23" or "Vol. VII, App. p. 1".

The original exhibits have not been included in the present record. Reproductions of a number of the most important will, however, be found in the appendices to Volume VII and Volume VIII.

nership return for the year 1949, and the evidence adduced by the Government, which disclosed over $29,000 in partnership income in addition to that reported in the return.

3. Whether the *corpus delicti* of the offense charged in Count Thirteen was sufficiently established, independently of the admissions of petitioner Cooke.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

SEC. 3809. VERIFICATION OF RETURNS; PENALTIES OF PERJURY. [as added by Sec. 4, Act of August 27, 1949, c. 517, 63 Stat. 666].

(a) *Penalties.*—Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(b) *Signature Presumed Correct.*—The fact that an individual's name is signed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

(c) *Verification in Lieu of Oath.*—The Commissioner, under regulations prescribed by him with the approval of the Secretary, may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required.

(26 U.S.C. 1946 ed., Supp. V, Sec. 3809.)

18 U.S.C.:

SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more person conspire either to commit any offense against the United States, or

to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

On December 12, 1951, an indictment in thirteen counts (Vol. I, pp. 2-17) was filed against petitioners in the United States District Court for the Southern District of California. Three separate types of offense were charged: (1) wilful attempted evasion of income taxes, in violation of Section 145(b) of the Internal Revenue Code; (2) making and subscribing false partnership returns, in violation of Section 3809 of the Internal Revenue Code;[2] and (3) conspiracy to commit the above two types of substantive offense, in violation of 18 U.S.C., Section 371. Count One charged all three petitioners with conspiracy to evade their income taxes for the years 1945, 1946 and 1947 by filing false individual returns, and with conspiracy to file false partnership returns for the years 1947, 1948 and 1949. In furtherance of the conspiracy, petitioners were alleged to have concealed the identity of the persons with whom they did business, the amounts they received, and the amounts they paid out; and they were alleged to have destroyed records of their

[2] The two counts on which petitioners were acquitted were brought under Section 145(c) of the Internal Revenue Code, since repealed.

transactions and to have maintained other records that were false. The overt acts alleged were the filing of the various returns. Counts Two, Four and Six charged all three with wilful attempted evasion of the income taxes of petitioner Goldbaum for the years 1945, 1946 and 1947. Counts Three, Five and Seven charged all three with a similar offense as to petitioner Capri. Counts Eight, Nine and Ten charged all three with a similar offense as to petitioner Cooke. Counts Eleven, Twelve and Thirteen charged all three with filing false partnership returns for the years 1947, 1948 and 1949, respectively. After a trial by the court, petitioners were found guilty on all counts, except Counts Eleven and Twelve (Vol. I, p. 20), and the court made special findings of fact (Vol. I pp. 23-32). Petitioners were sentenced to imprisonment for three years on each count, all terms to run concurrently. (Vol. I, pp. 35-38.)

The evidence to support the finding of guilt may very briefly be summarized as follows:

In May or June 1945, the three petitioners formed an equal partnership in Los Angeles under the name "Golden News Service" to operate as horse racing commissioners. (R. 623-625, 651-652.) They acted as brokers, accepting wagers from various "bettors" which they then "laid off" to various "takers". After the race, they received the money from the loser and forwarded it to the winner. If the "bettor" won they received no commission; but if the "taker" won they deducted a commission of 2½% to 5%. (R. 136, 513, 935.) The business

of the partnership was nation-wide and even international, the annual phone bill running as high as $77,000. (R. 592-593.)

The operation was illegal in California, and on January 29, 1949, the partnership removed to Las Vegas, Nevada. In order to obtain a license in Nevada, it was necessary for one of the partners to represent himself as sole owner, and the license was therefore obtained by petitioner Cooke under the name "Flamingo Commissioners". Three letters of Cooke, however, make it clear that Flamingo Commissioners was a partnership venture and that the partnership continued to use the name, Golden News Service, for some purposes in Las Vegas.[3]

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[3] These letters were introduced as Government's Exhibit 38. (R. 659, 738-740; Vol. VIII, App. pp. 1-2.) One of them reads as follows:

May 1, 1949.

Mr. Harry Sackman,
Tax Consultant,
201-222 Taft Bldg.,
Hollywood 28, Calif.

Dear Harry:

Kindly refer to my letter dated January 15, 1949, wherein I advised you that the GOLDEN NEWS SERVICE had moved its activities to Las Vegas, Nevada.

I wish to further advise you that in order to obtain a license in Las Vegas, Nevada, it was necessary for the writer to represent himself to be the sole owner of the said business, and, the said business was to be operated as the Flamingo Commissioners. As stated before, this was simply a routine matter requested by the License Commissioner of Las Vegas, Nevada, to comply with the issuance of licenses.

However, for income tax purposes, the joint venture of the GOLDEN NEWS SERVICE remains intact, *i.e.*, the GOLDEN NEWS SERVICE becomes a joint venturist with the writer and in turn the joint venturists of the GOLDEN NEWS SERVICE remain as heretofore.

Kindest regards.

Sincerely yours,

(S.) EDWARD COOKE.

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The partnership filed its income tax return for 1949 as the Golden News Service. (R. 660.) The figures used in the return were taken from the records of Flamingo Commissioners. (R. 512, 641-648.)

In addition to income from commissions on bets accepted from "bettors" and "laid off" to "takers", there was evidence that the partnership also had income from bets which it took itself instead of laying them off. Price, auditor of the Nevada State Tax Commission, examined the books of Flamingo Commissioners for the period between April 9 and April 26, 1949. He discovered that a number of bets were being laid off to a syndicate of "takers," one member of which had a 40% interest and was represented by the symbol "GN". (R. 144-153.) Cooke told Price that "GN" stood for petitioners Goldbaum and Capri, but that he himself had no part in the syndicate. (R. 126-127, 144-145.) However, it was in the interest of the partnership for Cooke, in whose name the license for Flamingo Commissioners had been obtained, to divorce himself from Goldbaum and Capri in the eyes of the Nevada authorities. (R. 126-127, 160-163, 188, 655-657.) Flamingo Commissioners charged no commission on bets which it laid off to the syndicate. (R. 655-657.) For the period between April 9 and April 26, 1949, the books of Flamingo Commissioners, as examined by Price, revealed that the syndicate had net winnings of $64,638.25. The share of "GN" was $29,060.75. (R. 144-153.)

The records of the partnership were kept in the

following manner: each individual bet was recorded on a small slip as soon as it was received; the information on the slips was transferred to a daily master sheet, which contained all "bettors" in its upper half and all "takers" in the lower half with space for balances and the amount of commissions; the daily balances and commissions were entered in cryptic fashion in a permanent bound ledger. (R. 131-144.) All the daily records were promptly and systematically destroyed. (R. 133-134, 184-185, 512, 521-524, 599.) When Price, the Nevada official, asked for the records during his investigation in late April 1949 he was given the bound ledger for 1949. Finding this inadequate because it failed to reveal the identity of "bettors" and "takers", he insisted on being shown the daily records. Cooke then produced the daily sheets for the period from April 9 to April 26, saying that all prior records had been destroyed. (R. 131-144.) As a result of Price's investigation, Cooke was ordered by the state authorities to keep proper records and to preserve the daily slips and sheets. (R. 162-170, 655-657.) Price made later checks in 1949 and found that the order was being obeyed. (R. 162-163.) However, when in June 1950 the internal revenue agents began the investigation which led to the present prosecution, they were told that all these records, with the single exception of the ledger book for 1949, had been destroyed. (R. 512, 521-524.)

The figures used in the 1949 partnership return were found to be almost identical with the totals

in the 1949 ledger.[4] (R. 641-651.) Neither the ledger nor the return reflected the $29,060.75 derived from the net winnings of the syndicate for the period from April 9 to April 26. (R. 153, 661-669.) And although there was evidence to show that the partnership had engaged in its regular commission business in Los Angeles prior to its removal to Las Vegas on January 29, neither the ledger nor the return reflected income of any type for that period.[5] (R. 375-376, 421-430, 691-698.)

There was evidence to show that the partnership operated on a cash, rather than on accrual, basis. The partnership returns specifically stated that they had been prepared on a cash basis. (R. 646-647.) When the revenue agents interviewed petitioner Goldbaum and the accountant, Sackman, the latter told them that a cash basis was used in both the records and the returns because, being gamblers, petitioners were concerned about "bad debts" arising from uncollectible wins which would have had to be reported when earned if they kept their books on an accrual basis. Goldbaum agreed that this was so. (R. 512-513, 626, 824-830.)

The Government demonstrated by computations showing annual increases in net worth that each of the individual partners had failed to report substantial amounts of individual income for the

---

[4] Sackman, the accountant who prepared the returns for the individual petitioners and for the partnership, received the figures over the phone from petitioners and did not use any of their records. (R. 599.)

[5] Because of the nature of the business, the partnership never had a losing day in respect of its commission operations. This appears clearly from the pages of the 1949 ledger.

years 1945, 1946 and 1947. One-third of the partnership net worth, computed on a cash basis, was attributed to each of the partners. The income totals are as follows (Vol. VIII, Appendices B, C, D and E):

		Reported	*Unreported*
Goldbaum	1945	$18,663.67	$30,069.95
	1946	15,871.68	6,386.73
	1947	8,424.33	3,020.59
Capri	1945	$ 5,527.67	$ 7,892.71
	1946	15,871.68	12,162.30
	1947	8,424.34	17,703.14
Cooke	1945	$ 9,902.67	$ 4,728.44
	1946	14,520.66	6,567.28
	1947	13,624.33	5,707.11

Petitioners did not testify themselves. The evidence adduced in their behalf was largely an effort to show that an accrual system of accounting was followed in the books and returns of the partnership, and that the government's calculations were consequently erroneous. Webster, the expert accountant who testified for the defense, admitted in substance that there was not enough evidence in the record upon which he could base a firm opinion that the partnership used an accrual system. (R. 1032-1037.)

The District Court's special findings of fact may briefly be summarized as follows (Vol. I, pp. 23-32, Vol. VIII, App. pp. 13-24):

1. *Conspiracy count.*—Petitioners conspired to file false individual income tax returns for 1945, 1946 and 1947, and a false partnership return for

1949. In furtherance of the conspiracy they concealed the identity of the persons with whom they dealt and the amounts of money they received and paid out. They used a code system in their records and destroyed most of them.

2. *Tax evasion counts.*—Petitioners knowingly assisted each other in filing individual income tax returns for the years 1945, 1946 and 1947 in which the amount of taxable income was substantially understated. Information as to certain income derived from commission business and gambling transactions was withheld from the accountant who prepared the returns. Both petitioners and the partnership reported income on a cash basis, but their books did not disclose true income and the Government's net worth computation clearly establishes substantial amounts of taxable income in addition to the amounts reported. With respect to each year the court found specific instances in which substantial amounts of partnership earnings had not been reported.

3. *False partnership return counts.*—Petitioners were found not guilty under Counts Eleven and Twelve. As to Count Thirteen, petitioners filed a partnership return for the year 1949 in which they reported gross receipts of $136,338.50, but knowingly omitted additional receipts of $29,060.75 derived from wagering. They also omitted all income received between January 1 and January 28, the amount of which could not be determined because the books had been concealed or destroyed by petitioners.

The Court of Appeals found no error as to the finding of guilt under Count Thirteen, and affirmed the convictions without discussion of the other counts since all terms of imprisonment had been made to run concurrently.

ARGUMENT

It is submitted that none of the three grounds upon which the petition for certiorari is based has merit. Moreover, in view of the concurrent sentences, the petition should be denied if the finding of guilt as to any one of the counts is free from error. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; cf. *Pinkerton* v. *United States*, 328 U. S. 640, 641-642.

1. Petitioners contend (Pet. 8-10) that the District Court disregarded the presumption of innocence, so far as the conspiracy and tax evasion counts were concerned. They point out that the finding of guilt as to these counts (One through Ten) rests upon the Government's net worth computation, and that this computation fails to take accounts receivable and accounts payable into consideration. They argue that the admission of such a computation had the effect of shifting the burden of proof to them by requiring them to explain the discrepancies between their reported income and the results of the Government's computation.

But both petitioners and the partnership were, as the District Court found, on a *cash* basis; and accounts receivable and payable have nothing to do with the net worth computation of a cash basis

taxpayer's income. An individual or entity reporting income on a cash basis in general reports income only as it is *actually received* and deducts expenses only as they are *actually paid;* on the accrual basis, income is reported when it is *earned,* whether or not actually received, and expenses are deducted as they are *incurred,* whether or not actually paid. Therefore, if the net worth computation of a cash basis taxpayer's income considers his accounts receivable and payable, in effect the computation is converting him into an accrual basis taxpayer against his choice. This is because the accounts receivable and accounts payable respectively reflect income earned but not yet received, and expenses incurred but not yet paid, whereas, by the definition above stated, a cash basis taxpayer is not required to report or allowed to deduct such items.[6] (See Vol. VIII, App. pp. 7-11.)

That accounts receivable and payable should be

[6] Loans receivable and payable, as distinguished from accounts receivable and payable, stand on a different footing and should be taken into account in the computation, regardless of the accounting basis employed. This is because the making or receiving of a loan is *not* a transaction affecting income or expenses, but is merely a conversion of one asset into a different form or the creation of a new asset and a corresponding offsetting liability. Hence, in this regard, the basis of accounting used in reporting income and expenses has no materiality. That is to say, when a loan is made or received, the net worth (assets minus liabilities) of the lender or borrower remains exactly as it was before the loan, regardless of the accounting basis used. On the other hand, the net worth of a person who acquires an account receivable or payable changes (i.e., the assets increase without any offsetting liability, or the liabilities increase without any offsetting asset) as these items arise, and whether this change in net worth reflects income or not depends on the accounting basis employed.

ignored in a net worth computation for a cash basis taxpayer was recognized recently by the Court of Appeals for the Eighth Circuit in *Leeby* v. *United States*, 192 F. 2d 331. There, as in the present case, the taxpayer objected to a net worth computation from which his accounts receivable and payable had been omitted. In affirming the correctness of the Government's exhibit, the court said at page 334:

> Defendant insisted that the government's exhibits were inaccurate because they did not take into account either bills payable or bills receivable. They were prepared, however, on the cash basis and there is nothing to indicate that defendant had adopted the accrual basis of accounting * * *.

Furthermore, accounts receivable and payable were asserted only as to the partnership, not as to the individual partners. But an elimination of the value of the partnership interest from the computations of the individual partners' net worth would still result in a showing that petitioners had underreported incomes in certain years. A computation included in the record (Vol. VIII, App. p. 12) discloses the following unreported income, exclusive of any interest in the partnership:

	1945	*1946*	*1947*
Goldbaum	$23,141.20	—	$ 8,338.51
Capri	963.96	$3,722.72	23,021.05
Cooke	—	—	11,025.02

Accordingly, even if petitioners were correct, no

ground would be presented for reversal in the present case.

2. Petitioners contend (Pet. 10-12) that there was a prejudicial variance between the offense as alleged in Count Thirteen and in the bill of particulars, and the offense actually established by the Government's evidence. Count Thirteen charged that the 1949 partnership return was false in that it disclosed gross receipts of $136,338.50, whereas petitioners knew that the partnership had actual gross receipts of $3,685,469.75. (Vol. I, p. 17.) The bill of particulars simply alleged that the actual gross receipts figure in the indictment had been derived from the books and records of the partnership. (R. 671-672; Vol. VII, App. p. 56.) The Government proved from the 1949 ledger (Ex. 31) that the partnership received commissions amounting to $136,338.50, as reported in the return (R. 641-646). The Government also adduced proof through Price, who had examined the original records for the period from April 9 to April 26, that the partnership had received additional income of at least $29,060.75 in the form of winning bets. Petitioners now contend that the theory of the indictment and bill of particulars was simply that they were required to report as gross receipts all money which they received from "bettors" and forwarded to "takers", or vice versa, in connection with their operations as betting commissioners. They claim to have been surprised by the introduction of evidence to show that they also had income from bets which they "took" themselves instead of "laying them off" to others. The argument is without support in the record.

It is true that the Government urged upon the trial court, without success, the theory that all money passing through the hands of the partners, as commissioners, should have been included in the gross receipts of the partnership. (R. 48-50, 64, 1109.) But the Government was not restricted to this theory by the indictment and the bill of particulars, for all that is said there is that the actual gross receipts alleged had been derived from the books and records of the partnership. And, as has been seen, the Government proved from the books and records that there were substantial receipts which had not been reported in the partnership return. Furthermore, the prosecutor made it perfectly clear in his opening statement that the Government intended to show that the partnership had derived income directly from gambling in addition to the commissions it collected on the bets of others. The prosecutor said (R. 8; cf. 39-41):

> In 1949 they moved to Las Vegas to the Flamingo Hotel there. That is when they operated as Flamingo Commissioners. Now, so far, I have said that their main source of income, the government contends, was from the commission business; but the government will also prove, in addition to the commission business, they engaged in gambling activities of the usual bookmaking sorts, only in large amounts, and the government will prove that they had a source of income from this type of transaction.

There was no objection to this statement by the prosecutor, nor was there a request for a continuance. On the first and second days of the trial,

the Government presented the testimony of Price, to which petitioners now point in claiming a variance. Petitioners not only failed to object on the ground of variance (R. 157), but specifically agreed to the admission of Price's working papers (R. 167), and clearly revealed by their cross-examination that they understood the purpose of the evidence (R. 122-197). Not until six days later did it occur to them to claim a variance. (R. 669-671.)

The discrepancy between the amount of unreported income alleged in the indictment and in the bill of particulars and the amount actually proved by the Government is immaterial. All that is necessary is that unreported income of a substantial amount be established. *Leeby* v. *United States, supra; Gendelman* v. *United States,* 191 F. 2d 993, 996 (C.A. 9th), certiorari denied, 342 U. S. 909; *United States* v. *Schenck,* 126 F. 2d 702, 704 (C.A. 2d), certiorari denied *sub nom. Moskowitz* v. *United States,* 316 U. S. 705; *Tinkoff* v. *United States,* 86 F. 2d 868, 878 (C.A. 7th), certiorari denied, 301 U. S. 689; *Gleckman* v. *United States,* 80 F. 2d 394, 399-401 (C.A. 8th), certiorari denied, 297 U. S. 709. Here, the Government proved unreported income of at least $29,060.75 during the period from April 9 to April 26, the only period for which evidence of the original records was available.

3. Petitioners contend (Pet. 12-13) that the Government's proof of guilt under Count Thirteen rests upon the uncorroborated admissions of petitioner Cooke, and that there is no independent evidence of the *corpus delicti.* The admissions re-

ferred to are evidently Cooke's three letters, two to Sackman and one to Greenbaum (R. 659; Vol. VIII, App. pp. 1-2), in which he clearly stated that the partnership was still operating as the Golden News Service after the move to Nevada, and his statement to Price that "GN" represented the Golden News Service, although he coupled this last with a denial that he himself had anything to do with the syndicate in which "GN" was a participant (R. 126-127, 146-147, 187). So far as we have been able to determine, this objection was never raised in either of the courts below.

The argument is without merit. The independent proof necessary to corroborate an admission need not be such as to establish the *corpus delicti* in itself. "Any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the *corpus delicti* at all, neither beyond a reasonable doubt nor by a preponderance of proof." *Daeche* v. *United States*, 250 Fed. 566, 571 (C.A. 2d); see also *United States* v. *DiOrio*, 150 F. 2d 938 (C.A. 3d), certiorari denied, 326 U. S. 771. Here, the partnership continued to make its returns under the name of Golden News Service after the move to Nevada. The use of the symbol, "GN", in itself clearly points to the partnership. And the partnership failed to charge commissions on bets won by the syndicate. These circumstances provide sufficient corroboration for Cooke's statements.

Furthermore, Cooke's letters were written, and his statements to Price were made, during the first

half of 1949. The false partnership return was not filed, and the offense was not committed, *until* January 1950. (See Vol. VIII, App. p. 16.) "The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated." *Warszower* v. *United States*, 312 U. S. 342, 347. See also VII Wigmore, Evidence (3rd ed., 1940), Secs. 2070-2071.

CONCLUSION

The decision below is clearly correct, and no conflict of decisions or important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1953.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 164 / 2

HY GOLDBAUM, GEORGE CAPRI AND EDWARD COOKE,

Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

IRVIN GOLDSTEIN,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 164

HY GOLDBAUM, GEORGE CAPRI AND EDWARD COOKE,

Petitioners,

vs.

UNITED STATES OF AMERICA

MOTION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioners herein and respectfully pray that this Honorable Court reconsider its order of October 13, 1953, denying the petitioner's application for writ of certiorari, and, in lieu thereof, grant the said application for writ of certiorari, and for grounds therefor say as follows:

1. The questions presented in petitioner's application are of great importance in the administration of the criminal law of the United States.

2. There is a serious conflict between different Circuit Courts of Appeal as to the matters involved in Question No. 1.

IRVIN GOLDSTEIN,
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Washington, D. C.,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 164

HY GOLDBAUM, GEORGE CAPRI AND EDWARD COOKE,

Petitioners,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Because of the importance of the questions involved in this petition for writ of certiorari, petitioners respectfully submit this additional brief in support of their application for reconsideration of this Honorable Court's order denying said petition.

The contention of the United States is that since petitioners were presumed to have reported income on a cash basis, therefore the determination of *actual* income by the "net worth" method justifies the disregard of accounts payable and receivable known to the prosecution.

The "net worth" method consists simply in calculating the increase in the net worth of the taxpayer for the tax years in question and charging such increased net worth

as actual income. Accounting methods have no sanctity in themselves, they are only the means of establishing actual income.

The United States holds for the theory that "accounts receivable and payable should be ignored in a net worth computation for a cash basis tax-payer." (Brief 14, 15). The incorrectness of such a view is exposed by the simplest of illustrations. A cash basis tax-payer purchases an automobile for two thousand dollars, paying five hundred dollars in cash and leaving an unpaid balance due of fifteen hundred dollars. Has this tax-payer's net worth increased two thousand dollars? Obviously not, but such is the position of the United States in this proceeding. And if this same cash basis tax-payer were prosecuted for tax evasion, with all of the facts known to the revenue agents computing the tax-payer's net worth, it is not permissible for the prosecution to offer proof of the automobile as an asset worth two thousand dollars, ignore the debt, and so lift from the prosecution the duty to establish that the income reported in the return filed was incorrect and place upon the tax-payer the burden of proving that the reported income was correct.

Leeby v. *United States*, 192 F. 2d 331 (CCA 8) cited by respondent in support of its contention, and *Gariepy* v. *United States*, 189 F. 2d 459 (CCA 6), upon which Leeby so greatly relies, are in addition to those cases cited by petitioners (Pet. Br. 9, 10) and accentuate the existing conflict between the Fourth, Sixth, Eighth, Ninth and Tenth Circuits on the one hand, and the Third, Fifth and Seventh Circuits on the other. Leeby holds, (page 334) that "all that was necessary to show was that there was omitted from the reported income a substantial amount." Not that the "substantial amount" was taxable income, not that it represented a real asset, but merely that the prosecution's

burden was the establishment of the omission of a "substantial amount". The *Gariepy* case, pages 462, 463, concedes the existence of the conflict in decisions of the circuits.

See also *Kirsch* v. *United States,* 174 F. 2d 595 (CCA 8) and *Gleckman* v. *United States,* 80 F. 2d 399 (CCA 8).

We are frequently warned against "subtle encroachment upon constitutional privileges" but what appears to be a definite trend in tax evasion cases toward relieving the prosecution of the burden of proving the defendant's guilt and requiring the defendant to prove his innocence would seem to be in obvious violation of the rules relating to presumption of innocence and self-incrimination.

Respectfully submitted,

IRVIN GOLDSTEIN,
Counsel for Petitioners.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14,648

CRIMINAL.

THOMAS W. BANKS, APPELLANT,

vs.

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

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Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit at the September Term, 1952, of said Court, before the Honorable Archibald K. Gardner, Chief Judge, and the Honorable Joseph W. Woodrough and the Honorable Seth Thomas, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 9th day of July, A. D. 1952, an appeal from the United States District Court for the District of Minnesota was filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in a certain cause wherein Thomas W. Banks was Appellant and the United States of America was Appellee.

Record printed by appellant and filed January 26, 1953, and supplemental record printed by appellee and filed February 24, 1953, on which the appeal was heard in said Court of Appeals, are in the words and figures following, to-wit:

RECORD

United States Court of Appeals

EIGHTH CIRCUIT

No. 14,648

CRIMINAL

THOMAS W. BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FILED
JAN 26 1953
E. E. KOCH

United States Court of Appeals

EIGHTH CIRCUIT

No. 14,648

CRIMINAL

THOMAS W. BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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RECORD

Indictment filed January 14 1952 in the office of the Clerk of the United States District Court for the District of Minnesota, Third Division, St. Paul, Minnesota. This indictment reads as follows:

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

CR. NO. 7446

UNITED STATES OF AMERICA

vs.

THOMAS W. BANKS

INDICTMENT

(26 USCA Sec. 145(b))

The Grand Jury Charges:

On or about the 15th day of January, 1946, in the City of St. Paul, Ramsey County, State and District of Minnesota,

THOMAS W. BANKS,

late of Minneapolis, Hennepin County, Minnesota, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of Ameirca for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $20,170.11, and that the amount of tax due and owing thereon was the sum of $7,675.27; whereas, as he then and there well knew, his net income for said calendar year was the sum of $55,363.21, upon which said net income he owed to the United States of America an income tax of $31,454.61; in violation

of Section 145(b), Internal Revenue Code; 26 U.S.C.A., Sec. 145(b).

SECOND COUNT

(26 USCA 145(b))

The Grand Jury charges that on or about the 15th day of March, 1947, in the City of St. Paul, County of Ramsey, State and District of Minnesota, aforesaid, one

THOMAS W. BANKS,

the identical person named in the foregoing Count of this Indictment, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $27,100.99, and that the amount of tax due and owing thereon was the sum of $10,556.98; whereas, as he then and there well knew, his net income for said calendar year was the sum of $39,275.07, upon which said net income he owed to the United States of America an income tax of $17,942.34; in violation of Section 145(b), Internal Revenue Code; 26 U.S.C.A., Sec. 145(b).

THIRD COUNT

(26 USCA 145(b))

The Grand Jury charges that on or about the 15th day of March, 1948, in the City of St. Paul, County of Ramsey, State and District of Minnesota, aforesaid, one

THOMAS W. BANKS,

the identical person named in the First Count of this Indictment, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him

to the United States of America for the calendar year 1947 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $20,609.29, and that the amount of tax due and owing thereon was the sum of $6,955.14; whereas, as he then and there well knew, his net income for said calendar year was the sum of $39,542.14, upon which said net income he owed to the United States of America an income tax of $17,817.24; in violation of Section 145(b), Internal Revenue Code; 26 U.S.C.A., Sec. 145(b).

A TRUE BILL

C. U. LANDRUM
United States Attorney

ROBERT ALBRECHT
Foreman

Notice of Motion, Motion and Affidavit to dismiss indictment filed February 18, 1952, in the office of the Clerk of the United States District Court, Third Division. Said Notice of Motion, Motion and Affidavit read as follows:

(Capton of Action)

NOTICE OF MOTION

TO: C. U. LANDRUM, United States Attorney
MILES W. LORD, Assistant United States Attorney
221 Federal Court Building
Saint Paul 2, Minnesota

PLEASE TAKE NOTICE, That at the Federal Courts Building, 6th and Market Streets, St. Paul 2, Minnesota, February 25th, 1952, at 10:00 o'clock A. M. or as soon there-

after as counsel can be heard, the above named defendant will move the Court as set forth in the attached motions.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

(Caption of Action) MOTION

The defendant respectfully moves the Court as follows:

1. To dismiss the indictment returned by the Grand Jury against him under date of January 14, 1952, on the following grounds and for the following reasons:

a. There was no legal evidence before such grand jury on such date to sustain and warrant the return of such indictment.

b. There was no sufficient legal evidence before such grand jury on such date to sustain and warrant the return of such indictment.

c. That such indictment was based solely on hearsay evidence.

d. That such indictment was based solely on incompetent evidence.

e. That such indictment was based partly on hearsay and partly on incompetent evidence.

f. That such indictment was obtained on violation of the Constitution of the United States and of law.

2. To require the members of the Grand Jury and all persons who were present with such Grand Jury when the case against this defendant was presented to such Grand Jury to disclose matters occurring before such Grand Jury.

3. To permit the furnishing to counsel for the defendant of a stenographic report of the proceedings before such

Grand Jury when the case against this defendant was presented to the Grand Jury.

The foregoing motions are made upon the affidavit attached hereto and upon such oral and documentary evidence as may be adduced at the hearing of said motions. The foregoing motions are made pursuant to the Federal Rules of Criminal Procedure, particularly Rules 6 and 12 and such other rules and provisions of law as may be applicable.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

(Caption of Action) AFFIDAVIT

STATE OF MINNESOTA
COUNTY OF RAMSEY ss

John W. Graff, being first duly sworn deposes and states as follows:

That he is an attorney at law duly admitted to practice in the state and federal courts in the State and District of Minnesota and has his office at 1220 Minnesota Building, St. Paul 1, Minnesota; that he is representing Thomas W. Banks, hereinafter referred to as the taxpayer, in the above captioned action, which action results from an indictment returned under date of January 14, 1952 by the grand jury of the United States District Court for the District of Minnesota; that said indictment charges the taxpayer in three counts with alleged violations of 26 U.S.C.A. 145(b), the specific charges being that the taxpayer willfully and knowingly attempted to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar years 1945, 1946, and 1947; that said indictment alleges that the net income and tax paid as shown by the returns of the taxpayer were as hereinafter set forth and that the net income claimed by the government and the

amount of total tax claimed by the government are as hereinafter set forth:

Year	Tax Returns		Indictment	
Involved	Net Income	Tax Paid	Net Income	Tax Due
1945	$20,170.11	$ 7,675.27	$56,363.21	$31,454.61
1946	27,100.99	10,556.98	39,275.07	17,942.34
1947	20,609.29	6,956.14	39,542.14	17,817.24
Totals	$67,880.39	$25,188.39	$135,180.42	$67,214.19

that the claimed deficiencies resulting from the net income and tax alleged in the indictment would be as follows:

Year	Net Income	Tax
1945	$36,193.10	$23,779.34
1946	12,174.08	7,385.36
1947	18,932.85	10,861.10
Totals	$67,300.03	$42,025.80

that your affiant has made some investigations of the facts and circumstances pertaining to the proposed prosecution by the United States of the taxpayer; that he makes this affidavit in support of the motions hereto attached; that he also makes this affidavit to constitute a sufficient showing to the Court that adequate grounds exist for a motion to dismiss said indictment because of matters occurring before the grand jury in order that the Court may direct members of the grand jury and all other persons who were present before such grand jury when the case against the taxpayer was presented to disclose all that transpired in the presentation of the case against the taxpayer and also in order that the Court may direct that a stenographic report of the proceedings before such grand jury when the case against the taxpayer was presented be made available to counsel for the taxpayer.

Affiant states that he has discussed the proposed tax case against the taxpayer with responsible counel in the Bureau of Internal Revenue which counsel was familiar with and

had before him at the time of such discussion a copy of the investigative report made by the Intelligence Unit of the Bureau of Internal Revenue; that such counsel advised affiant that the proposed case against the taxpayer was a so-called "net worth case" and that there was no claim in the investigative report that there was any specific unreported income capable of identification which was not included in the tax returns of the taxpayer for the calendar years 1945, 1946, and 1947; that affiant was advised that the government's starting point for their so-called net worth case was an affidavit executed by the taxpayer in July, 1937, which affidavit was not submitted in connection with any income tax matter.

Affiant further states that he has discussed the proposed tax case against the taxpayer with responsible counsel in the Department of Justice which counsel was familiar with and had before him at the time of such discussion a copy of the investigative report made by the Intelligence Unit of the Bureau of Internal Revenue; that such counsel advised affiant that the proposed case against the taxpayer was a so-called "net worth case" and that there was no claim in the investigative report that there was any specific unreported income capable of identification which was not included in the tax returns of the taxpayer for the calendar years 1945, 1946, and 1947; that affiant was advised that the government's starting point for their so-called net worth case was an affidavit executed by the taxpayer in July, 1937, which affidavit was not submitted in connection with any income tax matter.

That the taxpayer has advised affiant that he has not made any statement of any kind, either written or oral, concerning his income tax matters to any representative of the Bureau of Internal Revenue except that he has frequently made the statement that he knows of no tax that he owes but if he is shown that he owes any tax he will be glad to make arrangements for its prompt payment.

That in order for the government to be duly entitled to an indictment from a grand jury, the government must adduce competent and legal evidence under oath which evidence will: (1) overcome the presumption of innocence (2) prove all elements of the offense to be charged; and (3) convince the grand jury of guilt and that such evidence is sufficient, if unexplained and uncontradicted, to convict.

That it was incumbent, for the government before being entitled to the said indictment against the taxpayer to prove by competent and legal evidence under oath; that the affidavit executed by the taxpayer in July, 1937 was an appropriate and reliable starting point for its so-called net worth case; what the taxpayer's net worth (difference between assets and liabilities) was at the close of each of the calendar years 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, and 1947; what proportion of the taxpayer's net worth increase in each of the years was subject to income tax and what proportion of such increase in net worth during such periods was not subject to income tax; the amount reasonably expended by the taxpayer for living expense during such periods; that any substantial deficiency in income tax paid in each of the years 1945, 1946, and 1947, was the result of a wilful attempt to defeat and evade and specifying what constituted such affirmative willful attempts.

That affiant has been informed and advised that information pertaining to the proposed indictment of the taxpayer was furnished to the newspapers of the Twin Cities at least three to four days in advance of the meeting of the grand jury and that said newspapers were advised that the grand jury would convene on the morning of January 14, 1952, and that before noon an indictment would be obtained against the taxpayer; that affiant has been advised that representatives of Twin City newspapers were present in the court room of the Federal Courts Building at St. Paul, Minnesota, when the grand jury received its instructions from the Honorable Dennis F. Donovan, one of the Judges of the United States

District Court for the District of Minnesota and when six new members were sworn to act as members of the Grand Jury; that representatives of the newspapers were outside the grand jury room and were able to note the time when such grand jury commenced its sessions on January 14, 1952, how long they were in session on the morning of January 14, 1952, who testified before the grand jury on the morning of January 14, 1952; that it appears from the Minneapolis Morning Tribune for January 15, 1952 that the grand jury was called into session at 10:00 A.M. to receive instructions from Judge Donovan; that at 10:30 A.M. of that day the grand jury started hearing testimony; that at 11:30 A.M. of that day the grand jury sent word to the Court that it was ready to make a partial report to the Court; that at 11:45 A.M. the grand jury returned into Court the indictment against this taxpayer; that it appears from the Minneapolis Star for January 15, 1952 that the United States attorney and an assistant United States attorney stated that only one witness was called before the grand jury in connection with the presentation of the case against the taxpayers and that such witness was the special agent of the Intelligence Unit of the Bureau of Internal Revenue who directed the investigation into the affairs of the taxpayer.

That the conclusion is inescapable from the foregoing that the total time which could have been in presenting evidence to the grand jury had to be less than one hour since presumably the grand jury spent some time in considering the action it would take after the evidence was presented; that it is submitted as a matter of common sense that it is a physical and mental impossibility to adequately and properly by competent and legal evidence to present to a grand jury in less than one hour that an affidavit executed by the taxpayer was an appropriate and reliable starting point for the government's net worth case, what the taxpayer's net worth was at the close of each of the calendar years 1937 to 1947 inclusive; what proportion of the taxpayer's net worth in each of the years 1937 to 1947 inclusive, was subject to income tax

and what proportion of such increase in net worth during such periods was not subject to income tax; what amounts were reasonably expended by the taxpayer for living expenses during such periods; that there was a substantial deficiency in the amount of income tax paid during 1945, 1946 and 1947; that the substantial deficiency claimed was the result of a willful attempt to evade and defeat income tax; what constituted such affirmative willful attempts; that it must be obvious that all the foregoing evidence cannot be presented by one man in less than one hour without the use of a substantial amount of incompetent evidence if not all incompetet evidence; that it must be apparent that the indictment in this is the result of an endeavor to secure an indictment by a specified time and without regard or respect for the historic, legal and constitutional safeguards that should surround the presentation of a case to a grand jury; that if upon such an indictment a judgment is obtained and executed the taxpayer will be deprived of his liberty and property without due process of law as guaranteed by the Constitution of the United States.

That it is understood to be a sound and established rule of law that outside of questioning grand jurors for their vote or their sayings at their sessions and that indictment are not to be disclosed before defendants are arrested, the veil of secrecy otherwise existing concerning grand jury proceedings may be removed from all proceedings before them whenever such removal is essential to the enforcement of constitutional guarantees or to the protection or enforcement of public or private rights; that it is understood to be equally well settled that the grand jury is the organ of the Court and subject to its jurisdiction and direction and it is one of the duties of the Court to see that the acts and findings of the grand jury accord with and are not in violation of the Constitution and the law; that the constitution and the law are superior to the theoretical secrecy of the proceedings of the grand jury; that the facts in this matter demonstrate it is an extreme instance and in order to prevent clear injustice

and an abuse of judicial process, the Court should reveiw the evidence before the grand jury.

That the foregoing should make it apparent that the indictment in this case was obtained on the basis of incompetent evidence and in violation of the law and the Constitution and ample ground exists for the Court to cause a review to be made of all the evidence before the grand jury and that when this is done it will be demonstrated that the indictment should be promptly dismissed.

JOHN W. GRAFF

Subscribed and sworn to before me
this 16th day of February, 1952.

JOSEPH M. DONAHUE

Notary Public, Ramsey County, Minn.
My Commission Expires Aug. 15, 1953.

(NOTARIAL SEAL)

(Caption of Action)

Proceedings had in the above-entitled matter before the Honorable Dennis F. Donovan, one of the judges of said court, in his court room in the Federal Courts Building at St. Paul, Minnesota, on the 18th day of February, 1952, commencing at 10:00 o'clock, A.M.

Appearances:

Mr. C. U. Landrum, United States Attorney, and Mr. Miles W. Lord, Assistant United States Attorney, appearing on behalf of the Plaintiff;

Messrs. Hoffmann, Donahue & Graff, Attorneys-at-Law, St. Paul, Minnesota, by Mr. John W. Graff, appearing on behalf of the Defendant.

The following proceedings were duly had:

The Court: The United States vs. Banks.

Mr. Graff: If the Court please, may the record show that the defendant is here in the court room at the present time.

I would like to advise the Court that there has been a motion made on behalf of the defendant to dismiss the indictment. That motion was served on the United States Attorney's office this morning and was filed with the Clerk's office this morning. Now, we ask that the Court withhold the arraignment until that motion is heard and is determined.

The Court: I think I will determine it not later than the end of this week, Mr. Graff. If you are ready to go ahead now, we will hear the argument.

Mr. Lord: If the Court please, the Government is ready to argue this motion now.

The Court: Very well

Mr. Lord: We would like to have the motion decided as soon as possible.

The Court: Yes.

Mr. Graff: The motion is made returnable at the next Special Term.

Mr. Lord: That is for my benefit, if you please, Your Honor.

The Court: We will proceed with the argument this morning.

Mr. Graff: All right. May the record show at the inception, Your Honor, that our request to have the motion heard one week from today was overruled by the Court?

The Court: Well, I set it for today with the thought of having the defendant arraigned. We have re-set this several times now and it is getting to the point where the Court feels it will be dilatory to delay it further.

Mr. Graff: The only reason we are asking its delay, Your Honor—as soon as this motion is determined, we, of course,

can go ahead with the arraignment if it then should be necessary.

The Court: Yes. Well, I perhaps won't be here and I have got to take care of it now. I will be leaving next week and I don't want to put any unnecessary work on Judge Bell.

Mr. Graff: I might say, Your Honor, there is a lot of law involved in this particular matter which we would like to submit briefs on.

The Court: I presume you have your briefs ready now?

Mr. Graff: I don't have the brief ready now, Your Honor, but I can have it ready within a few days.

The Court: Well, we will proceed with the argument now and briefs can be filed on or before Friday.

Mr. Graff: Very well, Your Honor.

(Statement by Mr. Graff.)

(Statement by Mr. Lord)

(Statement by Mr. Landrum)

Following the statements of counsel it was agreed that both sides would file memorandums with the Trial Court on or before February 22, 1952. At that time Judge Donovan indicated that he will attempt to have an order filed on the Motion to Dismiss on or before February 29, 1952. Judge Donovan further indicated that word concerning the arraignment would be given by the Court some time during the next week.

Both sides filed memorandums with the Trial Court on or before February 22, 1952. Defendant's memorandum consisted of a brief on the law as well as a further showing in support of the Motions to dismiss the indictment. The portion of defendant's memorandum constituting a further showing in support of the Motions to dismiss is as follows:

(Caption of Action)

A—PREFATORY STATEMENT

The Grand Jury for the United States District Court for the District of Minnesota returned an indictment against the above-named defendant under date of January 14, 1952. The indictment is in three counts. In the first count it charges that the defendant did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States for the calendar year 1945. The second and third counts contain similar charges but pertain to the calendar years 1946 and 1947. The statute alleged to have been violated is 26 U. S. C. A. 145 (b). Pursuant to arrangements previously made, the arraignment of the defendant on the indictment was scheduled for February 18, 1952, at 10:00 A. M. Prior to the time of arraignment, a notice of motion, and supporting affidavit to dismiss the indictment were served on plaintiff's counsel and filed with the Clerk of Court. The notice of motion indicated that the motion was to be heard on February 25, 1952, 10:00 A. M. which was the next special term of the Court and the time when motions are to be made returnable. On February 18, 1952, at 10:00 A. M. counsel for the defendant advised the Court when the case was called that the defendant was present in Court and that a motion to dismiss the indictment was pending and was scheduled to be heard on February 25, 1952 at 10:00 A. M. Counsel for defendant then requested the Court in view of the pending motion to defer arraignment until the motions to dismiss were heard and determined by the Court. Counsel for the plaintiff stated to the Court that they wanted the motions to dismiss heard immediately. The Court thereupon indicated it would hear the motions immediately; counsel for defendant objected to the hearing of the motions at that time and the Court ordered the motions heard over defendant's objection. Arrangement was made at that time for the furnishing to the Court of a memorandum brief, which is to be furnished not later than February 22, 1952, at 5:00

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P. M. This constitutes not only our memorandum brief but also a further showing in support of the motions to dismiss the indictment.

B—THE MOTIONS

Reference is made to the motions themselves for greater particular. The motion in the first instance is a motion to dismiss the indictment because the indictment is not based on legal evidence but is based on hearsay and incompetent evidence and hence was obtained in violation of the Constitution and laws of the United States. In aid of this motion the Court is asked to direct that jurors and all persons who were present when the case was presented to the Grand Jury be permitted to disclose matters occurring before the Grand Jury. This request is made of the Court by the defendant as preliminarily to and in connection with a judicial proceeding brought about by the defendant's motion and a showing that grounds exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury. In proceeding as the defendant is proceeding it is submitted that he is squarely within the spirit and letter of Rule 6 (e) of the Federal Rules of Criminal Procedure which expressly recognizes the mode of proceeding.

In further aid of the motion to dismiss the indictment the Court is asked to permit and direct the furnishing of a stenographic report of the proceedings before the Grand Jury. If a proper stenographic transcript is available this would, of course, be the easiest way to handle the situation rather than have Grand jurors testify or have other persons testify as to what transpired before the Grand Jury. As will be observed later herein, the testimony had to consume less than one hour and is the testimony of only one witness and hence it will be a relatively short transcript. The examination of this transcript will take but a short period of time and it is submitted that the fact that this indictment is not based upon legal evidence but is based upon hearsay and incom-

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petent evidence will be readily established. Counsel for plaintiff came into Court and stated that this is not true and that the indictment is based on legal evidence. If this statement of counsel for plaintiff is true, then it is difficult to understand why they oppose so vigorously the furnishing of the transcript. Having in mind that the facts as they happened a number of years ago cannot be changed and if in fact the government has a proper case for prosecution what possible harm can result from such disclosure. If on the other hand the government does not have a proper case for prosecution and the indictment is not based on legal evidence but is based upon hearsay and incompetent evidence it is easy to understand the vigorous opposition.

At the time of the hearing of the defendant's motion to dismiss the indictment, it was suggested that the Court have made available to it a stenographic transcript of the evidence as a part of the consideration by the Court as to whether the transcript shall be furnished to the defendant. As heretofore indicated the transcript must of necessity be short and the Court will be in an excellent position to determine whether it will be furnished.

C—THE FACTS

There is no dispute concerning the fact that an indictment was returned against the defendant under date of January 14, 1952. The indictment sets forth the following figures for the calendar years 1945, 1946 and 1947:

Year	*Tax Returns*		*Indictment*	
Involved	Net Income	Tax Paid	Net Income	Tax Due
1945	$20,170.11	$ 7,675.27	$ 56,363.21	$31,454.61
1946	27,100.99	10,556.98	39,275.07	17,942.34
1947	20,609.29	6,956.14	39,542.14	17,817.24
Totals	$67,880.39	$25,188.39	$135,180.42	$67,214.19

Based upon the foregoing figures the deficiencies claimed by the indictment are the following:

Year	Net Income	Tax
1945	$36,193.10	$23,779.34
1946	12,174.08	7,385.36
1947	18,932.85	10,861.10
Totals	$67,300.03	$42,025.80

From these figures as they appear in the indictment it is the government's claim that the defendant's net income for each of the years 1945, 1946 and 1947 was substantially in excess of the amount stated in the return. As part of its case the government must prove such substantial understatement of net income. As stated in the affidavit attached to the motion defendant's counsel was advised by responsible counsel in the Bureau of Internal Revenue and in the Department of Justice that there is no claim in the investigative report that there is no specific unreported income capable of identification which was not included in the tax returns; that the government's case was a so-called net worth case and that the starting point for the net worth case was an affidavit executed by the taxpayer in July, 1937. For the purpose of this hearing let this fact be regarded as an established fact: the government's case is a net worth case, the starting point is an affidavit executed by the taxpayer in July, 1937, and there is no specific unreported income capable of identification which was not included in the tax returns. The government has seen fit not to file any counter affidavit and hence for the purpose of this motion these facts can be deemed to be admitted. If the Court has any reluctance in accepting this as a fact, then we ask leave to call these persons as witnesses and have their testimony taken on these three points. In lieu thereof the Court may see fit to require counsel for the government to either admit or deny these three points under oath. We want the Court

to have the facts and there should be no reluctance on anyone's part in furnishing these facts to the Court.

There certainly is no question about the fact that the Grand Jury convened on January 14, 1952, and that was the first time they were in session in the year of 1952. There can be no question that the only evidence presented in support of this indictment was presented on January 14, 1952, as the case concerning this defendant was not received by the United States Attorney at St. Paul, Minnesota from the Department of Justice at Washington, D. C. until early in January, 1952. On the morning of January 14, 1952, at approximately 10:00 A. M. this Court presided when six new members were sworn in as additional members of the Grand Jury and thereafter the Court instructed the new members as to their duties and at approximately 10:30 A. M. the Grand Jury started its session. At approximately 11:30 A. M. on January 14, 1952, the Grand Jury sent word it was ready to make a partial report to the Court; that at approximately 11:45 A. M. of that morning the indictment against this defendant was returned in open Court. Certainly the Court can take judicial notice of its own activities on the morning of January 14, 1952, and that it presided in Court from approximately 10:00 A. M. to 10:30 A. M. when the six new members were sworn in and when it instructed the new members as to their duties, and that at about 11:45 A. M. the Court received this indictment in open Court. For the purpose of this hearing let these facts be regarded as having been established: the Grand Jury met on January 14, 1952 and commenced its session at about 10:30 A. M. after having been instructed by the Court; that commencing at about 10:30 A. M. the government presented testimony concerning this defendant; that at 11:30 A. M. the government had completed presenting its case and the Grand Jury had deliberated and voted on the indictment affecting this defendant; that at 11:45 A. M. the indictment against this defendant was returned in open Court.

The affidavit attached to defendant's motion states that only one witness testified before the Grand Jury in connection with the presentation of the case against the defendant and that such witness was the Special Agent of the Intelligence Unit of the Bureau of Internal Revenue who directed the investigation into the defendant's affairs. In the Minneapolis Star for Tuesday, January 15, 1952, among other things the following is stated:

> "C. U. Landrum, United States attorney, and Miles W. Lord, asisstant district attorney, who presented the grand jury evidence, disclosed today that only one witness was called before the jury. He was an agent of the intelligence unit who directed the investigation into Banks' affairs."

At the hearing there was some comment about this newspaper article and the impression was gained that the United States Attorney denied he made any statement to the Minneapolis Star but that the assistant United States attorney indicated that only one witness may have been used. For the purpose of this hearing let the fact be regarded as having been established that only one witness appeared before the Grand Jury and that he was George McKusick, a Special Agent of the Intelligence Unit of the Bureau of Internal Revenue, the agent who made the investigation of the defendant. Here again the government has seen fit not to file any counter affidavit and these facts can be deemed to be admitted. If the Court has any reluctance in accepting as facts the time spent by the Grand Jury in deliberating on this case, considering it and voting on it and also that only one witness testified before the Grand Jury, then we ask leave to call witnesses who have direct knowledge of these facts. In lieu thereof the Court may see fit to require counsel for the government to either admit or deny these facts under oath. As heretofore indicated we want the Court to have

the facts and there should be no reluctance on anyone's part in furnishing the facts to the Court.

In order that there may be no misunderstanding with respect to the allegations of fact contained in this Section C—entitled "The Facts" we contend that these facts have been proven and have not been disputed but if the Court should take the view that these facts have not been proved then we hereby offer to prove the facts by calling witnesses and having their testimony taken under oath.

(Chapters marked "D", "E", "F", "G", "H" and "I" are omitted except that part of Chapter "I"—Conclusion" dealing with a further showing which part is as follows:)

Under the heading herein marked "C—The Facts" we set forth what the facts are it is our contention that these facts have been sufficiently proved. We are very desirous that this motion be determined on the merits and we do not want to be faced with a situation where the Court may say that we have not proved the facts or that the facts are alleged on information and belief and therefore are not sufficient to reach the questions that are really involved. So it is repeated with all possible emphasis, if these facts are not deemed to be proved by the present record then we want everything considered as an offer of proof and we want the Court to set it down for a hearing so that evidence may be taken and the facts established by the sworn evidence of witnesses. We think that thus far we have been denied the right of such hearing on the basis of what happened on the morning of February 18, 1952, and I am certain that this Court has no conscious desire to in any way abridge the rights under the law and constitution of this and any other defendant who may appear before it.

Memorandum and Order filed February 26, 1952, with the Clerk of the United States District Court for the District

of Minnesota, Third Division deferring determination of Motion to dismiss and setting arriagnment for February 29, 1952. Said Order and Memorandum read as follows:

(Caption of Action) ORDER

The above-entitled matter came on for hearing before the undersigned, in the Federal Courts Building, at St. Paul, Minnesota, on the 18th day of February, 1952, on motion by the defendant to dismiss the indictment herein on the grounds that said indictment is based on incompetent evidence, in violation of the Constitution and laws of the United States.

Hoffmann, Donahue & Graff, by John W. Graff, appeared for defendant in support of said motion,

and

C. U. Landrum, United States Attorney, and Miles W. Lord, Assistant United States Attorney, appeared for the United States of America in opposition thereto.

The Court having heard the oral arguments of counsel and considered the brief submitted in behalf of each party, and being fully advised in the premises,

IT IS ORDERED that the determination of said motion to dismiss the indictment be, and the same hereby is, deferred for determination at the trial of the general issue by the judge presiding at the trial of the above-entitled matter.

IT IS FURTHER ORDERED that February 29, 1952, at ten o'clock a. m., be set as and for the purpose of the arraignment of the defendant.

The Memorandum of the Court attached hereto is made a part of this Order.

Dated this 26 day of February, 1952.

DENNIS F. DONOVAN,
United States District Judge.

MEMORANDUM

The arraignment of defendant was continued from time to time at the request of defendant. The matter was last set for ten o'clock a. m. on February 18, 1952. On the last date defendant served, filed and made a motion to dismiss the indictment, and the matter was orally argued. Subsequently briefs were filed with the Court by each party, and the Court has considered all that has been said and written by counsel.

The old practice permitting consideration of a motion to quash has been abolished; hence objections to an indictment must be made by a motion to dismiss, as provided by Rule 12, Federal Rules of Criminal Procedure.

The motion was properly made by defendant before entering a plea to the indictment. Obviously, the Court is limited to its own knowledge of the matter, and the present status of the file. The affidavit and brief of defendant's counsel evidence thorough research and preparation. Suffice it to say the Court is not persuaded to require production of a reporter's transcript of the proceedings before the Grand Jury. Removal of the veil of secrecy from what transpired in the presence of that body in my opinion is not warranted at this stage of the proceeding. Granting that the indictment must be based on competent evidence, I am not impressed that the time consumed in the presentation of evidence was too little. In the presentation of evidence before the jury, time is a relative matter.

The result reached here, in keeping with Rule 12(b) (4), preserves all rights of defendant.

If defendant pleads not guilty at the time of arraignment, he should be prepared for trial, subject to the further order of the Court.

DENNIS F. DONOVAN,
United States District Judge.

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On February 29, 1952, the defendant was arraigned and entered a plea of not guilty to each of the three counts of the indictment. Immediately following the arraignment the United States of America filed and served two bills of particulars. Said two bills of particulars served and filed on February 29, 1952, read as follows:

(Caption of Action) **BILL OF PARTICULARS**

The United States of America, in compliance with the order of this Court entered on the 29th day of February, 1952, gives the following information:

Net Worth as of December 31, 1944

Cash and U. S. Government Bonds	$ 24,783.99
Receivables	51,449.82
Investments	68,035.04
Real estate and other property	100,154.54
Total assets	$244,423.39
Less Liabilities: Loans payable	12,684.66
Net worth as of December 31, 1944	$231,738.73

Dated: February 29, 1952.

C. U. LANDRUM

C. U. LANDRUM
United States Attorney

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(Caption of Action) **BILL OF PARTICULARS**

The United States of America, in compliance with the order of this Court entered on the 29th day of February, 1952, gives the following information:

Net Worth December 31, 1945

Cash and U. S. Government Bonds	$ 40,061.77
Receivables	60,675.12
Investments	99,124.62
Real Estate and other property	95,574.05
Total Assets	$295,435.56
Less Liabilities: Loans payable	12,084.66
Net Worth December 31, 1945	$283 350.90
Less Net Worth December 31, 1944	231,738.73
Increase in Net Worth	$ 51,612.17
Less: Non-taxable income	2,352.47
Net Worth increase of taxable income	$ 49,259.70
Plus: Living expenses and Federal Income Taxes paid	$ 10,131.17
Adjusted gross income of T. W. Banks and Reta Banks	$ 59,390.87
Less: Income reported by Reta Banks	1,374.38
Adjusted gross income of T. W. Banks	$ 58,016.49
Less: Personal deductions per return, 1945	2,653.28
Correct Net Income, 1945	$ 55,363.21
Net Income per 1945 return	20,170.11
Unreported Income 1945	$ 35,193.10

Net Worth December 31, 1946

Cash and U. S. Government Bonds	$ 6,530.14
Receivables	61,159.97
Investments	141,391.87
Real Estate and other property	110,447.62
Total Assets:	$319,529.60
Less Liabilities: Loans payable	8,584.66
Net Worth December 31, 1946	$310,944.94
Less Net Worth December 31, 1945	283,350.90
Increase in Net Worth	$ 27,594.04
Less: Non-taxable income	104.73
Net Worth increase of taxable income	$ 27,489.31
Plus: Living expenses and Federal Income Taxes Paid	17,482.44
Adjusted gross income of T. W. Banks and Reta Banks	$ 44,971.75
Less: Income reported by Reta Banks	948.40
Adjusted gross income of T. W. Banks	$ 44,023.35
Less: Personal deductions per return, 1946	4,748.28
Net income, 1946	$ 39,275.07
Net income per 1946 return	27,100.99
Unreported income, 1946	$ 12,174.08

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Net Worth December 31, 1947

Cash and U. S. Government Bonds	$ 11,211.37
Receivables	85,859.97
Investments	111,640.49
Real Estate and other property	128,149.63
Total Assets	$336,861.46
Less Liabilities: Loans payable	1,037.38
Net Worth December 31, 1947	$335,824.08
Less Net Worth December 31, 1946	310,944.94
Increase in net worth	$ 24,879.14
Less: Non-taxable income	2,283.28
Net Worth increase of taxable income	$ 22,595.86
Plus: Living expenses and Federal Income Taxes Paid	21,565.66
Adjusted gross income of T. W. Banks and Reta Banks	$ 44,161.52
Less: Income reported by Reta Banks	352.42
Adjusted gross income of T. W. Banks	$ 43,809.10
Less: Personal deductions per 1947 return	4,266.96
Net income for 1947	$ 39,542.14
Net income per 1947 return	20,609.29
Unreported income, 1947	$ 18,932.85

Dated: February 29th, 1952.

C. U. LANDRUM
United States Attorney

Notice of Motion, Motion and Affidavit for additional Bill of Particulars filed with the Clerk of the United States

BLEED THROUGH

District Court Third Division, St. Paul, Minnesota. Said Notice of Motion, Motion and Affidavit read as follows:

(Caption of Action) NOTICE OF MOTION

TO: C. U. LANDRUM, United States Attorney
MILES W. LORD, Assistant United States Attorney
221 Federal Courts Building
Saint Paul 2, Minnesota

PLEASE TAKE NOTICE, that at the Federal Courts Building, 6th and Market Streets, Saint Paul 2, Minnesota, at a Special Term of said Court to be held on March 24, 1952, at 10:00 o'clock A. M. or as soon thereafter as counsel can be heard, the above-named defendant will move the Court as set forth in the attached motion.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

(Caption of Action)

MOTION FOR BILL OF PARTICULARS

The defendant hereby moves the Court to require the plaintiff to furnish to him a bill of particulars concerning the indictment in the above-entitled matter as set forth herein:

1. With reference to the first count of the indictment, particulars are requested whether there is any claim made by the plaintiff that deductions from gross income in the 1945 tax return of the defendant are false in whole or in part.

2. If the particulars furnished pertaining to the request numbered one show that there are certain deductions from

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gross income in the 1945 tax return of the defendant claimed by the plaintiff to be false in whole or in part, particulars are requested stating the amount of and identificaton of each such deduction claimed by plaintiff to be false.

3. With reference to the first count of the indictment, particulars are requested stating whether it is the claim of the plaintiff that the gross income of the defendant was understated for the year 1945.

4. With reference to the first count of the indictment, particulars are requested listing the amount of and source of each item constituting the gross income claimed by the plaintiff that the defendant had for the year 1945.

5. With reference to the first count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed by plaintiff to have been omitted from the gross income reported by the defendant for the year 1945.

6. With reference to the first count of the indictment, particulars are requested listing the amount of and source of each item constituting the net income claimed by the plaintiff that defendant had for the year 1945, which is claimed in the indictment to be in the amount of $56,363.21.

7. With reference to the first count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed to have been omitted from the net income reported by the defendant for the year 1945.

8. With reference to the first count in the indictment, particulars are requested whether it is claimed by the plaintiff that taxable income was received by the defendant during 1945 from sources other than those shown on the tax return of the defendant for the year 1945.

9. With reference to the first count in the indictment, particulars are requested whether the plaintiff claims that

BLEED THROUGH

the taxpayer did not receive funds during 1945 which were not taxable income.

10. With reference to the first count in the indictment, particulars are requested whether the amount of alleged net income for 1945 of the defendant set forth in the indictment is derived and obtained solely by plaintiff by the use of the so-called net worth method.

11. With reference to the first count in the indictment, particulars are requested that if the amount of alleged net income for 1945 of the defendant set forth in the indictment is not derived and obtained solely by plaintiff by the use of the so-called net worth method then what specific items and their amounts are claimed by the plaintiff to have been omitted from the net income reported by the defendant in his tax return for 1945..

12. If the method used by the plaintiff in determining the alleged net income of the defendant for the year 1945 was by use of the so-called net worth method particulars are requested naming the first year constituting the starting point of plaintiff's net worth computations used in determining the claimed net income of the defendant for the year 1945.

13. With reference to the second count of the indictment, particulars are requested whether there is any claim made by the plaintiff that deductions from gross income in the 1946 tax return of the defendant are false in whole or in part.

14. If the particulars furnished pertaining to the request numbered thirteen show that there are certain deductions from gross income in the 1946 tax return of the defendant claimed by the plaintiff to be false in whole or in part, particulars are requested stating the amount of and identification of each such deduction claimed by plaintiff to be false.

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15. With reference to the second count of the indictment, particulars are requested stating whether it is the claim of the plaintiff that the gross income of the defendant was understated for the year 1946.

16. With reference to the first count of the indictment, particulars are requested listing the amount of and source of each item constituting the gross income claimed by the plaintiff that the defendant had for the year 1946.

17. With reference to the second count of the indictment, particulars are requested listing the amount of each such item which are claimed by plaintiff to have been omitted from the gross income reported by the defendant for the year 1946.

18. With reference to the second count of the indictment, particulars are requested listing the amount of and source of each item constituting the net income claimed by the plaintiff that defendant had for the year 1946, which is claimed in the indictment to be in the amount of $39,275.07.

19. With reference to the second count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed to have been omitted from the net income reported by the defendant for the year 1946.

20. With reference to the second count in the indictment, particulars are requested whether it is claimed by the plaintiff that taxable income was received by the defendant during 1946 from sources other than those shown on the tax return of the defendant for the year 1946.

21. With reference to the second count in the indictment, particulars are requested whether the plaintiff claims that the taxpayer did not receive funds during 1946 which were not taxable income.

22. With reference to the second count in the indictment,

particulars are requested whether the amount of alleged net income for 1946 of the defendant set forth in the indictment is derived and obtained solely by plaintiff by the use of the so-called net worth method.

23. With reference to the second count in the indictment, particulars are requested that if the amount of alleged net income for 1946 of the defendant set forth in the indictment is not derived and obtained solely by plaintiff by the use of the so-called net worth method then what specific items and their amounts are claimed by the plaintiff to have been omitted from the net income reported by the defendant in his tax return for 1946.

24. If the method used by the plaintiff in determining the alleged net income of the defendant for the year 1946 was by use of the so-called net worth method, particulars are requested naming the first year constituting the starting point of plaintiff's net worth computations used in determining the claimed net income of the defendant for the year 1946.

25. With reference to the third count of the indictment, particulars are requested whether there is any claim made by the plaintiff that deductions from gross income in the 1947 tax return are false in whole or in part.

26. If the particulars furnished pertaining to the request numbered twenty-five show that there are certain deductions from gross income in the 1947 tax return of the defendant claimed by the plaintiff to be false in whole or in part particulars are requested stating the amount of and identification of each such deduction claimed by plaintiff to be false.

27. With reference to the third count of the indictment, particulars are requested stating whether it is the claim of the plaintiff that the gross income of the defendant is understated for the year 1947.

28. With reference to the third count of the indictment,

particulars are requested listing this amount of and source of each item constituting the gross income claimed by the plaintiff that the defendant had for the year 1947.

29. With reference to the third count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed by plaintiff to have been omitted from the gross income reported by the defendant for the year 1947.

30. With reference to the third count of the indictment, particulars are requested listing the amount of and source of each item constituting the claimed net income claimed by the plaintiff that defendant had for the year 1947 which is claimed in the indictment to be in the amount of $39,542.14.

31. With reference to the third count of the indictment, particulars are requested listing each item and the amount of each such item which are claimed to have been omitted from the net income reported by the defendant for the year 1947.

32. With reference to the third count in the indictment, particulars are requested whether it is claimed by the plaintiff that taxable income was received by the defendant during 1947 from sources other than those shown on the tax return for the year 1947.

33. With reference to the third count in the indictment, particulars are requested whether the plaintiff claims that the taxpayer did not receive funds during 1947 which were not taxable income.

34. With reference to the third count in the indictment, particulars are requested whether the amount of alleged net income for 1947 of the defendant set forth in the indictment is derived and obtained solely by plaintiff by the use of the so-called net worth method.

35. With reference to the third count in the indictment, particulars are requested that if the amount of alleged net

income for 1947 of the defendant set forth in the indictment is not derived and obtained solely by plaintiff by the use of the so-called net worth method then what specific items and their amounts are claimed by the plaintiff to have been omit ted from the net income reported by the defendant in his tax return for 1947.

36. If the method used by the plaintiff in determining the alleged net income of the defendant for the year 1947 was by use of the so-called net worth method, particulars are requested naming the first year constituting the starting point of plaintiff's net worth computations used in determining the claimed net income of the defendant for the year 1947.

37. For the first year constituting the starting point of plaintiff's net worth computations for the years 1945, 1946, and 1947, please furnish the following particulars as of December 31st of such first year:

(a) *Cash*—List location of each amount of cash and the amount in each location.

(b) *Government Bonds*—List each bond and the amount of each such bond.

(c) *Investments*—List each investment and the amount in each investment.

(d) *Receivables*—List each receivable and the amount in each such receivable.

(e) *Real Estate*—List each piece of real estate and the value ascribed to each such piece of real estate.

(f) *Other Property*—List each other item of property claimed to be owned by the defendant and the value of each such item of property.

(g) *Liabilities*—List each item of liabilities and the amount of each such item of lability.

(h) *Non-Taxable Income*—List each item of non-taxable

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income and the amount of each such item of nontaxable income.

(i) *Living Expenses*—List the items of living expenses and the amount of each item of living expense. Items of living expense can be grouped under general headings such as food, clothing, medical expenses, etc.

38. Please furnish the particulars requested in request numbered thirty-seven (a) to (i) inclusive for each year subsequent to the starting point year up to and including the year 1947.

At the time and place heretofore indicated for the hearing of said motion, request will also be made such other and further relief as to the Court may seem just and proper. Said motion is made pursuant to Rule 7 (b) of the Federal Rules of Criminal Procedure and is based upon all the files, records and proceedings heretofore had and of file in the above-captioned matter, the affidavit hereto attached, such other development as may transpire pertaining to this matter.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

(Caption of Action) AFFIDAVIT

State of Minnesota, County of Ramsey, ss.

John W. Graff, being first duly sworn deposes and states as follows:

That he is an attorney at law duly admitted to practice in the state and federal courts in the State and District of Minnesota and has his office at 1220 Minnesota Building, St. Paul 1, Minnesota; that he is representing Thomas W. Banks in the above captioned action, which action results from an indictment returned under date of January 14, 1952, by the

BLEED THROUGH

Grand Jury of the United States District Court for the District of Minnesota; that said indictment charges the taxpayer in three counts with alleged violations of 26 U. S. C. A. 145 (b), the specific charges being that the taxpayer willfully and knowingly attempted to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar years 1945, 1946, and 1947.

That he has prepared the foregoing motion and notice of motion for a bill of particulars which motion is made pursuant to Rule 7 (f) of the Rules of Criminal Procedure; that the purpose of the bill of particulars requested is to secure a more specific statement of the facts than set forth in the indictment and to prevent surprise at the trial by the production of evidence that the defendant would not be prepared to meet; that the indictment contains but a terse statement of the charge made against the defendant and that unless the defendant is advised as requested in the motion for a bill of particulars, the substantial rights of the defendant will be prejudiced; that the defendant is entitled to the bill of particulars requested because the indictment, although probably sufficient in law to charge an offense, is so lacking in particularity and in information and is so extremely general in the language of the charge that the defendant is not given a fair and reasonable opportunity to prepare for his defense.

JOHN W. GRAFF

Subscribed and sworn to before me this 10th day of March, 1952.

RAE D. IRWIN
Notary Public, Ramsey County, Minn.
My Commission Expires July 22, 1953.

Affidavit of George H. McKusick filed February 24, 1952, with the Clerk of the United States District Court, Third Division at St. Paul, Minnesota, in opposition to defendant's

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request for a bill of particulars. Said Affidavit reads as follows:

(Caption of Action) AFFIDAVIT

STATE OF MINNESOTA
COUNTY OF RAMSEY ss.

GEORGE H. McKUSICK, being first duly sworn, deposes and says that he is a Special Agent, Intelligence Division, Bureau of Internal Revenue; that in the course of his duties as such Special Agent he was assigned to investigate the tax liability of the above named defendant; that the sources from which he obtained the information by which he arrived at the tax liability of the defendant were the following: Signed sworn statements made by the defendant to the Government; the defendant's signed and sworn tax returns; the books and records of various business ventures in which the defendant is interested; the records of various banks with whom and through whom the defendant had transacted business; public records and documents in the City, Federal and County Courthouses and various public offices in the State of Minnesota; the answers to certain questions which were given by the defendant through his attorney and agent-in-fact, J. A. O'Gordon, and by interviews with various persons who owed the defendant money, who had borrowed money from defendant, or were otherwise connected with defendant in business transactions;

Affiant further states that during the entire course of his investigation, the defendant refused to be interviewed by affiant or other agents, but instead made his representations through Mr. Weinstock, his accountant and attorney-in-fact, Mr. O'Gordon, his attorney-in-fact, Mr. Archie M. Carey, a Minneapolis attorney, who was engaged in various ventures with the defendant, Simon Meshbesher, a Minneapolis attorney, who has represented him in various business transac-

tions, and Philip A. Brancheau, a real estate dealer who carried on various transactions for the defendant;

During the course of the investigation, affiant was making certain routine inquiries of Simon Meshbesher as to his dealings with the defendant, and at said time Mr. Meshbesher inquired as to a means whereby the investigation could be brought to a speedy conclusion; affiant thereupon invited Mr. Meshbesher and the defendant to attend a conference in the office of Special Agent in Charge, A. A. Stone, Bureau of Internal Revenue, St. Paul, Minnesota; the defendant did not appear at this meeting to answer questions and substantiate his returns as to his tax liability, since at this point it was incumbent upon the defendant to substantiate the returns as he had made them; he elected instead to send representatives O'Gordon and Meshbesher to the meeting; Attorney O'Gordon proposed that questions be submitted in writing to him, and that he would refer them to the defendant who would answer them; O'Gordon thereafter filed a power-of-attorney running from the defendant to himself and after said power-of-attorney was signed, certain questions were submitted to the defendant through his agent, Mr. O'Gordon; that after some three months, Mr. O'Gordon returned with the defendant's answer to said questions; that the answers to said questions indicate that the defendant is well aware of the various evidentiary material that has been collected by affiant and other agents, but which is not a part of public records or included in the records of defendant's various enterprises; that from time to time, in the course of the investigation, affiant, in making the inquiries of the defendant's agents and attorneys, has had occasion to discuss certain other items involved in the Government's case, and that the answers given by the defendant's agents and attorneys indicate that they are well aware of the facts in controversy;

Affiant further states that Mr. O'Gordon, who represented

defendant during four previous tax investigations, and the defendant himself were aware of the fact that such an investigation was taking place since 1946, and has had the six intervening years within which to prepare his own showing of the true facts concerning his income;

Affiant further states that during the month of February, 1952, he was advised by Miles W. Lord, Assistant United States Attorney, that he should prepare a Bill of Particulars, in which Bill of Particulars he should set out the various categories of property ownership which the Government contended were owned by the defendant, and that he should further give the defendant's beginning net worth and his net worth at the close of each of the years involved herein, and a specific itemization for the beginning and close of each of the prosecuting years showing the type and amount of each of the items which go to constitute the total net worth figure broken down into the following categories: Cash and U. S. Government bonds, receivables, investments, real estate and other property, and the liabilities then existing; Mr. Lord advised affiant that this must be done promptly at the defendant's arraignment, in order that the defendant would not be prejudiced and could prepare himself for trial at the April Term in St. Paul, Minnesota;

Affiant further states that in compliance with this request, he, in conjunction with Revenue Agent Gerald O. Kleven, who was also assigned to this case, prepared such statements for the prosecution years, and that he was in court when such statements were presented to the attorney for defendant, the date on which this was done being the 29th day of March, 1952;

Further affiant saith not, except that this affidavit is made in support of the Government's position in opposing a motion for Supplementary Bill of Particulars.

GEORGE H. McKUSICK

Subscribed and sworn to before me this 24th day of March, 1952.

MILDRED E. JOHNSON

Notary Public, Ramsey County, Minn.
My Commission expires November 30, 1958.

Order and Memorandum filed March 31, 1952, with the Clerk of the United States District Court, Third Division, St. Paul, Minnesota, denying defendant's motion for a bill of particulars. Said Order and Memorandum read as follows:

(Caption of Action.)

ORDER

Thomas W. Banks, the above named defendant, on March 24, 1952, at the Federal Courts Building, St. Paul, Minnesota, presented to the undersigned Judge of this Court a motion for an order requiring the United States of America, plaintiff, to furnish a bill of particulars concerning the indictment in the above entitled action.

Mr. Miles W. Lord appeared for the plaintiff.

Mr. John W. Graff appeared for the defendant.

On the files and records in the case, the briefs and arguments of counsel and on due consideration.

IT IS ORDERED, That said motion be and it hereby in all respects is overruled.

Dated: March 31, 1952.

By the Court:

ROBERT C. BELL
United States District Judge

(Caption of Action.)

MEMORANDUM

An indictment containing three counts was returned against the defendant January 14, 1952, by a Grand Jury acting within and for the State of Minnesota in which he is charged with tax evasions for the years 1945, 1946 and 1947 in violation of 26 U. S. C. A. 145 (b). On February 29, 1952, the defendant was arraigned at which time he entered a plea of not guilty to each of the three counts of the indictment. Following the arraignment the government furnished to the defendant a bill of particulars supplementing the allegations of the indictment.

On March 24, 1952, the defendant presented to the court a motion for a bill of particulars. The motion is resisted by the plaintiff.

At the conclusion of the oral argument on the motion, the court allowed the defendant till March 27, 1952, to file a Memorandum. The Memorandum has been filed and carefully considered by the Court.

The motion for a bill of particulars in this case is made pursuant to Rule 7 (f) of the Federal Rules of Criminal Procedure which provide that the court may for cause direct the filing of a bill of particulars and further that a motion for a bill of particulars must be made within ten days after arraignment or at such other time as may be provided by rule or as the court may direct. Neither Rule 7 (f) nor any other rule contained in the Federal Rules of Criminal Procedure provide under what circumstances the court shall grant a bill of particulars or under what circumstances it should be denied. The grounds for allowing or refusing a bill of particulars must be found in the law as developed by the courts in cases of this kind. The rules do not provide what information may be sought in a bill of particulars and resort also must be had to the law as developed by the courts.

It is well settled that the allowance of a bill of particulars is in the sound discretion of the court and is to be exercised according to the circumstances of the case. Wong Tai v. United States, 273 U. S. 77. The purpose of a bill of particulars is to inform the accused of the nature of the charge with sufficient precision to enable him to prepare for trial, to prevent surprise, and to plead his acquittal or conviction in bar of any prosecution for the same offense.

In the case under consideration the court has examined the bill of particulars voluntarily furnished by the plaintiff. The record shows that the defendant's financial affairs have been under examination at least four times in the past by agents of the Bureau of Internal Revenue and that in the course of the present investigation, which was commenced in 1946, he was represented by lawyers and tax experts and that he is fully conversant with facts pertaining to the taxation of his income and property. Moreover, it appears that the information of the plaintiff was obtained from the books and records of the defendant, from public records, banking institutions with which the defendant has transacted business, stockbrokers where the defendant has purchased and sold stocks and securities. Where information obtained by the government is already within the defendant's knowledge a bill of particulars is wholly unnecessary. United States v. Kelley, 92 F. Supp. 672, in which the court said:

> "The rule with respect to bills of particular in criminal indictments is expressed in 42 C. J. S., Indictments and Informations, s 156 p. 1092, as follows: 'Its purpose is to enable accused to prepare his defense and to avoid surprise at the trial, to plead his acquittal or conviction in bar of another prosecution for the same offense, and to compel the prosecution to observe certain limitations in offering evidence. It is not the function of the bill to furnish accused with the evidence of the prosecution.'
>
> * * * * *

"He does not need a bill of particulars to help him prepare his defense for the reason, as heretofore stated, he is more familiar with the source of his income than is the government and neither could he be surprised in view of the government's frank statement that its proof will involve income from sundry sources commingled in a single bank account. In United States v. Kushner, 135 F. 2d 668, 673, the Court of Appeals, 2 Cir., said in respect a denial of a motion for a bill of particulars, that such a "denial must stand 'in the absence of a showing that appellant was unfairly surprised or prejudiced at the trial by the Government's evidence.' And then the court said: 'Actually, also the bill partook more of the nature of a fishing expedition than of a reasonable request for information upon the part of one who denied all knowledge of or participation in the importation of any gold bullion.'"

The language of the court in United States v. Andrews, 97 F. Supp. 572, is appropriate here.

"A rule of guidance, as it is understood, is that the government will not be required to make a disclosure in detail of its evidence. Each case, of course, depends upon its own peculiar facts, but the effect of granting of this motion in toto would be to require the government to disclose substantially upon all of its evidence. * * *"

* * * * *

"Further, the government should state, without itemizing, the total receipts from the defendant's advertising businesses claimed to be unreported; the total of the amount charged on defendant's books as business expenses which were used either for purchase of capital assets or for personal use which are claimed to be unreported; the total of cash withdrawals by the defendant transferred to his personal account and claimed to

have been falsely charged to expenses; the total of fictitious entries in defendant's books of alleged expenses claimed to never have been incurred; the total of receipts of rent from real estate unreported; and the total income from oil leases unreported."

Consequently, it appears that the information sought is already within the defendant's knowledge or is available to him; that the defendant will be able to prepare his case and to avoid surprise at the trial; that the defendant will be able to plead his acquittal or conviction in bar of another prosecution for the same offense without obtaining the information requested. Obviously, this is a so-called "net worth" case and the defendant not only has all the evidence pertaining to his financial affairs during the period involved but also the theory of the prosecution. As we have seen, the function of a bill of particulars is not to furnish accused with the evidence of the prosecution, but rather is to furnish the essential facts on which the alleged offense is based.

The motion is overruled.

Dated: March 31, 1952.

By the Court:

ROBERT C. BELL
United States District Judge

At the opening of the April, 1952, term of the United States District Court for the District of Minnesota, Third Division, held at St. Paul, Minnesota, on April 1st, 1952, the defendant moved the Court for a continuance of the trial of his case to the November, 1952 term of such Court. This motion of the defendant was denied and the Trial Court set the case down for trial on May 19, 1952.

Transcript of Proceedings and Testimony commencing on May 19, 1952.

(Caption of Action)

Proceedings had in the above-entitled matter before the Honorable Robert C. Bell, one of the Judges of said Court, and a jury, in Court Room No. 1, Federal Courts Building, St. Paul, Minnesota, commencing on the 19th day of May, 1952, at 10:00 o'clock, A. M.

PRESENT:

Mr. C. U. Landrum, appearing specially for the United States Attorney for the District of Minnesota; Mr. Miles W. Lord, Assistant United States Attorney for the District of Minnesota; and
Mr. Richard Buhrman, appeared specially on behalf of the Tax Division of the Department of Justice, Washington, D. C.

Messrs. Hoffmann, Donahue & Graff, Attorneys-at-Law, 1220 Minnesota Building, St. Paul, Minnesota, by Mr. A. Jerome Hoffmann and Mr. John W. Graff, and Mr. Richard E. Kyle, Attorney-at-Law, W2162 First National Bank Building, St. Paul, Minnesota, appearing on behalf of the Defendant.

(The following proceedings were had in the Court's Chambers:)

THE COURT: You may present your motion, Mr. Graff.

MR. GRAFF: If the Court please, on behalf of the defendant, at this time we ask an opportunity to further present the motion which was previously presented to the Court to dismiss the indictment herein on the ground and for the reason that the evidence adduced before this Grand Jury was such that there could not validly be returned an indictment.

In order that I may put the motion in its proper focus, it is going to be necessary for me to advise the Court of some

of the surrounding circumstances since this was presented to another Judge of this court and I am assuming that this Court has not been advised as to what transpired at that time.

Under date of February 18, 1952, a motion was made on behalf of the defendant, which motion was served on the United States Attorney's office on February 18, 1952, and was filed with the Clerk of this Court on the same date. For greater particularity, reference is made to the notice of motion, the motion, and the affidavit attached thereto. The motion was returnable on the next special term day, which was February 25, 1952. Notwithstanding the fact that the motion was made specifically returnable under date of February 25, 1952, the trial court, over the objection of counsel, insisted that the matter be heard on February 18, 1952. The reason given by the Court sitting at that time was this—and I quote from the transcript of the proceedings at that time—"Well, I perhaps won't be here and I have got to take care of it now. I will be leaving next week and I don't want to put any unnecessary work on Judge Bell."

In view of the Court's ruling at that time we argued the motion to the Court on the morning of February 18, 1952. We asked the Court at that time to submit oral testimony and the Court indicated that it did not want to hear any oral testimony at that time. We then proceeded and argued the motion on both sides, and pursuant to arrangement made, briefs were filed with the Court I think on February 22nd or 23rd of 1952, which was the same week. Thereafter, Judge Donovan made an order dated February 26, 1952, and I make reference to the order for greater particularity, but one portion of the order reads as follows: "It is ordered that the determination of said motion to dismiss the indictment be and the same hereby is deferred for determination at the trial of the general issue by the Judge presiding at the trial of the above-entitled matter."

The Federal Rules of criminal procedure provide in Rule 12(B)(4) as follows:

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"A motion before trial raising defenses or objections shall be determined before trial unless the Court orders that it be deferred for determination at the trial of the general issue."

I am assuming that Judge Donovan's order was made pursuant to this particular provision, although the order does not so state.

In connection with hearings on motion, Rule 12(B)(4) provides: "All other issues of fact"—and this is on motions—"shall be determined by the Court with or without a jury, or on affidavits, or in such other manner as the Court may direct."

In this case we have submitted the motion on affidavit and we have requested in our moving papers that we wish to take oral testimony in connection with the motion. Under date of January 14, 1952, the Grand Jury for the District of Minnesota was reconvened. It is my understanding that this Grand Jury had been previously called and they were called back to again consider matters commencing on Monday, January 14, 1952. At that time the jury reported here to Judge Donovan at 10 o'clock in the morning of January 14, 1952. There were six new members of the Grand Jury who had to be instructed by the Court and who were sworn in as members of this Grand Jury. At approximately 10:30 on January 14, 1952, the Grand Jury left the court room of Judge Donovan and proceeded to go into the Grand Jury Room. At 11:30, approximately one hour later, the Grand Jury sent word to Judge Donovan that it was ready to make a partial report to the Court. At 11:45 A.M. on January 14, 1952, the jury did report to Judge Donovan and returned one indictment, the indictment in this particular case, United States vs. Thomas W. Banks, No. 7446, Criminal.

The noon editions of the newspaper carried stories of the indictment. Now, the indictment against this taxpayer is an indictment under Section 145(B) of Title 26, U.S.C.A., which is commonly referred to as the "Tax Evasion Section" of the Internal Revenue Laws. That is a felony, and the indict-

ment charges in three counts, three separate offenses. It charges for the year '45 that there was an attempt to evade and defeat income tax in the amount of $23,779.34; it charges that for the year 1945 the defendant had a net income of $56,363.21; that the tax on that amount of net income would be $31,454.61; that the taxpayer made a return indicating that his net income was $21,170.11, and that the tax paid by the taxpayer was $7,675.27.

The reason that I meticulously go into the figures is because these are matters presumably which should have been the subject of proof before the Grand Jury.

In the second count, which covered the year 1946, the net income disclosed by the tax return was $27,100.99. The tax paid was $10,556.98. The indictment charges that the net income was $39,275.07; that there was a tax due on that amount in the sum of $17,942.34; that there was a deficiency in net income amounting to $12,174.08, and there was a deficiency in tax amounting to $7,385.36.

The indictment shows that the third count charges the same offense with respect to the year 1947, and that the taxpayer in his return showed a net income of $20,609.29; and that he paid a tax of $6,956.14. The indictment claimed that the net income was $39,542.14; that the tax which was due was $17,817.24; that there was therefore a deficiency in net income amounting to $18,932.85, and there was a tax deficiency amounting to $10,861.10.

Again I say I cite all those figures because it was necessary for the Government to adduce competent proof with respect to each and every one of these particular figures, and it would take some time just to read the figures, as evidenced by what I have just experienced.

Now, the affidavit states that there appeared in the Minneapolis Star on the afternoon of January 14, 1952, a statement attributed to the then United States Attorney and an assistant United States Attorney that there was only one witness before this Grand Jury and that such witness was a

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special agent of the Intelligence Unit of the Treasury Department who investigated the case. That fact appears from our affidavit and is, as far as the record goes, undisputed at the present time. The affidavit sets forth that as part of my work in connection with this case, that I had discussed the case with responsible counsel in the Bureau of Internal Revenue; that I was advised by responsible counsel in the Bureau of Internal Revenue, who at that time had before him and with him a copy of the investigative report made by the Intelligence Unit of the Bureau of Internal Revenue, and counsel so stated to me, that the case against this taxpayer and defendant was a so-called "net worth case;" further, that there was no claim in the investigative report that there were any specific income items capable of identification which were not included in the tax returns of the taxpayer for each of the years 1945, 1946, and 1947; that the beginning of the Government's so-called net worth case was an affidavit executed by the taxpayer in July of 1937, and which particular affidavit had not been submitted in connection with any income tax matter. The affidavit further states that I had discussed the case against the taxpayer with responsible counsel in the Department of Justice. I might say that that was in Washington, D. C.

Such counsel at the time had before him a copy of the investigative report made by the special agent who investigated the case; that such counsel advised me that the case against the taxpayer was a net worth case; that there were no specific items of income which were capable of identification and which were not included in the tax return of the taxpayer; that the starting point of the net worth case was an affidavit executed by the taxpayer in July of 1937, and that such affidavit was not submitted in connection with any income tax matter.

The affidavit also states that the defendant and the taxpayer has advised me that at no time has he made any statement, either written or oral, concerning his income tax

matters to any representative of the Bureau of Internal Revenue except that he has made the statement that he knows of no tax that he owes.

Of course, the obvious reason for that is to preclude any claim on the part of anybody that there was any confession or admission against interest, or any extra judicial statement which might be attributed to the taxpayer.

On the basis of this record, it was then incumbent upon the United States, if they wished to seek an indictment against this defendant, to present to a Grand Jury proper, competent evidence, which would warrant the return of the indictment. Under the circumstances which existed, the type of case we have—a so-called net worth case—the absence of any admissions by the taxpayer, the type of starting point which was had, and only one witness,—I state without fear of contradiction from anyone that it was a physical and mental impossibility to present a net worth case against this or any other taxpayer under the conditions then and there existing, and that the return of an indictment under the circumstances under which it was returned was an indictment which was not founded upon competent evidence. It was an indictment which violated the constitutional rights of this defendant.

We may say,—What should a Grand Jury have before it before it can return an indictment? I think the following statement from American Jurisprudence is as good a statement as I could find: "It is the general rule and almost universal practice for a Grand Jury to find indictments on the testimony of witnesses appearing and testifying before it under oath, and it is the common law rule that indictments should be founded upon credible evidence that there is probable cause for an accusation against the person accused. The common law rule of probable cause is equally controlling in the modern practice in the absence of statutes requiring a higher degree of proof. Under this rule, credible evidence which exists in the minds of the Grand Jury, means an

honest and reasonable belief that an offense has been committed and that the accused is guilty of it, is a sufficient basis to warrant a finding in return of an indictment against him, although under the express terms of the statutes, a greater quantum of proof may be required."

This Court has instructed grand juries many, many times on their duties. I have heard the Court instruct them on some of those occasions. This Court has instructed grand juries and knows the rule very well that grand juries are only to consider competent testimony, and that no testimony other than competent testimony and testimony which would be admissible in court should be presented to a grand jury.

The Court: You will soon be through?

Mr. Graff: Yes, shortly, Your Honor.

Now, I might say to Your Honor that it is a matter of common knowledge that only one witness testified before this Grand Jury. There are three newspaper men out there that I am satisfied I can call any one of them and they will so testify. I don't want to embarrass them in any way. I say it is a matter of common knowledge that only one person testified before this Grand Jury, and it is a matter of common knowledge who this particular person is. I do not want to proceed in this matter in any manner other than on a clear representation of the facts to the Court. But it is my understanding that those are the facts. Now, if those are the facts, I see no reason why there should be any apprehension or reluctance on the part of the persons representing the United States in this matter to admit them. If they do not choose to admit them, then we would like to take oral testimony to establish those facts.

Now, I have reserved the question of what the effect will be of an indictment which is returned on the basis of improper and incompetent testimony. I might say in brief that it is our position that it cannot stand and that a con-

viction fastened on such an indictment would be improper and should not be permitted to stand.

Now, other than argument of the question of the facts where they are established, I would like to close at this time unless my associates think something further should be added.

(Remarks off the record.)

Mr. Graff: (Continuing) I might say, Your Honor, that my proposal to take the testimony at this point does not go into the question of what was said before the Grand Jury, but, rather, what the true facts were as to what happened before the Grand Jury,—not the testimony, so I am not asking the court to hear any testimony.

The Court: Very well.

Mr. Landrum: If the Court please, in the beginning I wish to say that I am sure we all realize that what counsel proposes to this Court is most extraordinary and unusual. This matter was presented to Judge Donovan fully. It was argued by both sides and briefed by both sides. We have now heard counsel read portions of the affidavit upon which his motion is based. An examination of that affidavit will disclose that except for excerpts drawn from the indictment itself, practically each and every allegation in it is made on hearsay and is incompetent and is immaterial.

As we read the books, in order for this motion to prevail, there must be presented to this Court a clear and positive showing, based upon facts and not based upon what someone read in some newspapers, or what someone told him down in Washington, or what someone else may have said to him. We do not dispute the fact that if this affidavit was based upon a proper showing, that this Court might take further testimony; but it is our position that that showing is wholly

lacking in the affidavit which has been presented in support of this motion.

I must address myself just a moment to the proposition that he quotes, or talks about something that appeared in the Minneapolis Star. That has occurred before and it occurred in the argument before Judge Donovan wherein it was stated in the affidavit which is presented here in support of this motion that I, C. U. Landrum, and Miles W. Lord, assistant United States Attorney, stated that only one witness was presented to that Grand Jury. When that statement was made in Judge Donovan's court, I arose and said that so far as I was concerned that was not true. I made no such statement to any reporter of any newspaper, and I repeat it now as an officer of this Court.

So we say that in order for him to prevail in this motion, he must come in here with some sort of a showing based upon something clear and concise. Now, averments on information and belief have been uniformly held to be insufficient showing for this purpose. The case of the United States vs. American Medical Association, 26 Federal Supplement, 429 so holds.

The Eighth Circuit has decided many leading cases on this subject. In McKinney vs. the United States, 199 Fed. 25, the indictment which was there being attacked was found by the Grand Jury upon the evidence of a single Post Office Inspector who testified to many things which would not be the "best evidence" or strictly speaking admissible in a contested matter. The Court there states the rules which have since been used as guides in matters of this kind.

In Anderson vs. the United States, 273 Fed. 20, C. A. 8, 1921, it was alleged that certain papers which were submitted as evidence to the grand jury were wrongfully seized. The court in sustaining the denial of the defendant's motion said this:

" * * * We understand the rule to be that an indictment cannot be set aside or avoided on such an objection unless it affirmatively appear that there was no evidence of the commission of the offenses presented to the grand jury, or unless all of the evidence which it heard on the inquiry was unlawfully procured in violation of some fundamental right of the party indicted, and which would be barred on the trial as incompetent and inadmissible against him. This Court has so decided in McKinney vs. the United States, 199 Fed. 25; 117 C. C. A., 403. * * *"

In Murdick vs. United States, 15 Fed. 2nd, 965, (C. A. 8, 1926) the Court cites the Anderson case and again refers to the opinion in McKinney vs. United States as settling the question in this jurisdiction.

Now, counsel has submitted in support of this motion his own affidavit. In that affidavit he makes certain statements as to his conclusions, based upon information and belief, to the effect that the Grand Jury was in session for only a short time, and that they could not possibly have received and considered proof of a net worth case as defendant's counsel believes it must be presented.

Such evidence, if it may be called evidence—and we contend that counsel's statement and his conclusions are not evidence—we contend that although they are uncontroverted, they should not be considered. That is in the Medical Association case which I have just cited, and it is plainly stated there. Now, counsel says that there is no opposing affidavit, and in view of the fact that there is no affidavit opposing his affidavit, which is submitted on information and belief, therefore the facts set forth in his affidavit must be true.

Now, if Your Honor please, that is the vice of the situation. In other words, he says, "Why, the Government should come in here and by affidavit tell us what was presented to the Grand Jury."—therefore getting the very information which

he seeks in this motion by virtue of an affidavit submitted in opposition to his.

Now, the constitutional guarantees of a defendant are not violated by irregularities, such as presenting incompetent evidence to a Grand Jury, and that was decided in the McKinney case.

If Your Honor please, we have searched and it is submitted that none of the cases in any jurisdiction have ever held that such conclusions, based upon hearsay, are sufficient evidence to cause an inquiry into the proceedings before a Grand Jury. It is further submitted that even if such conclusions are taken to be facts, that the facts set forth concerning the circumstances under which the indictment was returned do not constitute a sufficient showing to make the inquiry requested.

In other words, to boil it down, if Your Honor please, here they seek a most extraordinary thing. They seek something which all of us as lawyers have always felt that we had a very definite opinion upon, and that was the right to go behind the action of a Grand Jury and to inquire with relation to what took place before a Grand Jury, and I am sure that it has been the opinion of all of us, as it has been mine, that in order that such action might be taken, it could only be taken upon the most clear and concise showing in support of the motion. We therefore say that inasmuch as this affidavit simply says that counsel was informed by reading the newspaper that there was only one witness before the Grand Jury, that counsel was informed by some lawyer down in the tax division of the Department of Justice that this was based upon an affidavit in 1937, that he had received this information and that information,—that the affidavit in support of this motion is absolutely insufficent upon which Your Honor should grant it, and upon that we stand.

Mr. Graff: If the Court please, in connection with the comment of counsel and the cases that were submitted, we

have cited many of the cases in our brief. I think that the cases referred to by counsel were all decided prior to the advent of the new criminal rules, and in that connection I want to call the Court's attention to Rule 6(e) pertaining to the disclosure of matters happening before the Grand Jury. The particular portion that I have in mind is this: Speaking of disclosure, the rule states, "Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the Grand Jury only when so directed by the Court, preliminary to or in connection with a judicial proceedings, or when they are permitted by the Court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury."

We submit that this provision of this rule is applicable to this particular situation. Now, there must be at this stage of the proceeding something that must be readily apparent to the Court. I do not think this Court was here at the time that this indictment was returned. I think this Court should know what the fact was.

Is it a fact that this is a net worth case? Is it a fact that only one witness appeared? Is it a fact that there was less than one hour consumed in the presentation of this case to the Grand Jury?

Now, unless those facts are made available to the Court, the Court is going to have a little bit of difficulty in determining this motion on its merits. The bill of particulars which was furnished by the Government demonstrates that it is a net worth case and I think the memorandum of the Court, made in connection with the bill of particulars, makes the same observation.

Now, we insist upon our right to take oral testimony in connection with this motion since apparently counsel for

the Government do not see fit to advise the Court what the facts are, and I think this Court should not be deprived of what the facts are.

The Court: Is there anything further, gentlemen?

Mr. Landrum: That is all the Government has, Your Honor.

The Court: If this motion is overruled, are you ready to proceed with the trial of this case?

Mr. Landrum: The Government is ready.

The Court: The defendant is ready?

Mr. Graff: Yes, Your Honor, but as I indicated, we feel that we have a right to present oral testimony and we specifically request the exercise of that right in connection with our motion to establish the facts.

The Court: You want to present oral testimony as to the evidence that was presented to the Grand Jury?

Mr. Graff: No, Your Honor, I don't want to go into the evidence that was presented to the Grand Jury. I simply want to establish those facts for the record.

The Court: You want to establish the fact that a very short time was taken to present the testimony to the Grand Jury and that it was impossible to fully or sufficiently present the facts to the Grand Jury in the length of time that was occupied?

Mr. Graff: That is part of it, Your Honor. I also want to establish the fact that if it is a net worth case, that only one person testified, and some other facts along that line. It is not going to take long at all.

Now, right on that point, counsel mentioned that the vice of the matter was that we tried to get them to make an affidavit. I am not trying to get the other side to do anything.

They will have to proceed as they see fit. We have made an affidavit in connection with our motion. They have seen fit not to make one. Whatever the reasons are, I do not know, except as stated by counsel.

Now, as to our affidavit, I think for the purpose of this motion the Court will have to assume the facts are as stated in our affidavit. Nothing else has been presented to the Court by way of the facts, and as a further presentation of facts we want to present oral testimony simply as further evidence of what the facts are.

The Court: Well, you haven't undertaken to state in your affidavit the contents of the testimony that was presented to the Grand Jury?

Mr. Graff: No, Your Honor, because I don't know that, of course. I can only arrive at that by a process of what I perceive to be logical induction. We don't want to go into those facts—what the man testified to, what he said. Now, I think this: I think this Court has a perfect right to say to the Government, "You make available to me as the Court the transcript of what happened before this Grand Jury." —and then this Court can decide this motion very easily. We don't even want to see it. I would like to have the Court read it, however.

The Court: Well, of course, I had no information that this motion was coming this morning. Perhaps I should have known it. I could have ascertained that such motion might be presented this morning by examining this file and by reading Judge Donovan's order heretofore made in the case. That was made last January or February—

Mr. Graff: February 26th, Your Honor.

The Court: We can probably assume the truth of the statements made in counsel's affidavit. Counsel for the Government perhaps would be willing to concede that substantially the facts as stated are correct. That is, that an

hour's time was taken; that one witness was presented to the Grand Jury, and the matter considered by the Grand Jury for a very brief space of time when the indictment was then returned.

So I doubt if very much would be gained by offering oral testimony to prove those facts. Counsel for the defendant has stated that he could call in the newspapermen who were perhaps familiar with the facts and prove what he desires to prove. That may be true, but I am doubtful of the propriety of spending time to introduce oral testimony to prove something about which there is probably no controversy. I dislike to go into a case if there is some substantial showing that a matter of this kind should have preliminary consideraton, and yet this case has been set for trial for six or seven weeks, even since I returned and have had something to do with it. A jury has been ordered here to start the trial of this case and I am inclined to think that this motion should be overruled and that the trial should be commenced. That will be the order of the Court.

Now, are there any other matters?

Mr. Graff: There are, Your Honor, and I presume we may have an exception to the Court's order on our motion?

The Court: Certainly.

Mr. Graff: The next matter, I think probably as long as we have the reporter here, I probably would like to take that up next because there are some matters which will not require the attendance of the reporter. We wish to make a motion to dismiss Count 1 of the indictment, which refers to the calendar year of 1945, on the ground and for the reason that the offense is barred by the Statute of Limitations.

Now, unlike the previous motion, I do not wish to offer any evidence on it, and I suggest to the Court that this motion be deferred for consideration during the trial of the

case, as the testimony which will be developed will bear on this motion. I think that we are entitled to raise the question under our plea of not guilty. However, in order that the record may be adequately protected, we want to make the motion at this time for the record and then have the Court rule on it when all the testimony is in.

The Court: Very well, it may be considered when the facts have been presented that will show whether or not it is barred by the statute.

Of course, I will say this to counsel for the Government: If the claim is unquestionably barred by the statute, the Government might as well move for a dismissal—

Mr. Landrum: We realize that, Your Honor, but we think there is more to it than that statement.

The Court: Well, we will see in due time. Now, is there anything else?

Mr. Graff: We have nothing further for which we would need the reporter, Your Honor.

(Discussion off the record, after which the following proceedings were had in open court, in the court room:)

The Court: Ladies and gentlemen of the jury panel: I am anticipating a number of you are present at this time. I am sorry that there has been a delay in calling the court to session this morning, but some preliminary matters have been under consideration that have been presented to the Court by counsel for the respective parties in the case that the Court has under consideration.

Now, you have been called here to serve as jurors in the case of the United States of America vs. Thomas W. Banks. Do not permit anyone to communicate with you about this case. Perhaps I need not say that to you or to a great number of you, but very fine citizens sometimes, who are not familiar with court procedure and the matters that the

Courts have in hand, may enter into a conversation with strangers, lawyers,—perfectly thoughtlessly and without any wrongful intent, and someone may tell you many things about some suit that you as jurors might be called to pass upon, and you do not want to do that. The Court doesn't want you to and the lawyers do not want you to. So wherever you may be, with anyone you may be conversing with, just do not hear anything said to you about the case of the United States vs. Thomas W. Banks, because that is the burden that I have and that you have until it is terminated.

You may meet the lawyers who are engaged on one side or the other of this case. It may be someone of your personal acquaintance. You may feel that you can converse with the lawyer, pass the time of day, inquire about health and so on, as people often do. Now, it just isn't good policy to fraternize with the lawyers on either side of the suit that is to be tried in court. So if they may happen not to see you, they know that they shouldn't. They agree with the Court. So just pass on and they will do likewise, and it will not be embarrassing to you or to them. That is the proper procedure. Even if you meet them in the hall, just do not visit with the lawyers on either side of the table. They will understand it, and after I explain it to you as I am, you will also understand it.

Do not talk to any witnesses in this case. Do not talk to anyone about it. You may be selected on the jury; you may not. Twelve persons and two alternates will try this case. You will not all be selected and you will not be called on this jury, but some of you must serve the Court in this case. That is why you have been called here and you will become an officer of this court and it is necessary to do your duty. Citizens are not called to spend very much time in the courts of our country to pass on the civil rights of fellow citizens, pass on the freedom and liberty sometimes of citizens, and it is an important duty that you are called

upon to perform, but when many of our citizens are putting on a uniform and spending many years of their life in behalf of this country, even to the extent of engaging in war on foreign lands, you and I can afford to spend some time here to try important cases, and that is what you have been called here for.

So just avoid talking to anybody about this case or any other case that might be on the calendar at this time, and report at 1:30. You will be called at that time. If there are urgent reasons why you should be excused, the Court will undertake to find some way to excuse you. I trust not many of you will desire to be excused for any reason, but I will tell you why this afternoon an excuse might be proper. I will not go into that at this time. So you will report at 1:30 in this court room.

A number of witnesses have been called in this trial. Some may be present. You should be here and you should be here day after day until counsel who have called you excuse you, or until this Court has excused you before you leave the jurisdiction of the Court. You may be wanted tomorrow; you may not be wanted for several days. I do not know as to how long this case will last, but you should know that you are obligated under your subpoena to be here until you are excused.

Mr. Lord: If the Court please, as far as the United States Attorney's office is concerned, strictly as a matter of convenience to the witnesses, we might suggest that the Court advise them that if they are desirous of being excused, they should report to the United States Attorney's office.

The Court: You called them, did you?

Mr. Lord: We have called them into this court room, Your Honor, and at this time we would like to have the Court advise them that they are not being summoned to the United States Attorney's office, but as a matter of con-

venience to them and the Court and the United States Attorney's office, we might do some of our clerical work in the United States Attorney's office and that therefore they can, if they are desirous of being excused until we call them, report to our office directly below here and we will then make arrangements for those who have banking business to do, and such things, to go about their business until we need them.

The Court: Of course, these persons have been called here by you as witnesses and it will not be improper for you to confer with them or give them such information as may be necessary for their comfort and convenience. You can excuse them for a day or two days with direction to report in the court at such times as they may be required by you in the presentation of your case. That will be agreeable. That is true of counsel for defendant also.

The Court: Both sides have announced that they are ready for trial in this case.

Mr. Clerk, you will call a jury.

Mr. Landrum: If the Court please—

The Court: Yes.

Mr.Landrum: I would like at this time, if Your Honor please, to move the admission specially for the purpose of this case of Mr. Richard Buhrman, an attorney of the Tax Division of the Department of Justice, who sits here.

The Court: He may appear for practice in this case.

Mr. Landrum: Thank you, Your Honor.

The Court: You may call a jury, Mr. Clerk Call the panel first.

(Roll call of jury panel called by the Clerk.)

The Clerk: There are 38 jurors present, Your Honor.

The Court: Ladies and gentlemen of the panel, I announced the purpose of this jury call here before the luncheon hour. It is unfortunate that jurors must be called from their homes and their various lines of business to serve as jurors in court, but the Constitution guarantees the right of trial by jury in many cases, civil and criminal. It is necessary to have jurors serve in the courts in order to carry out the constitutional provision. That is why you are here today.

Sometimes citizens may be excused from jury service in cases of emergency, or because of bad health,—especially bad eyesight and bad hearing. If you are an officer of the State, of the County, or City, you are entitled to be excused on that ground. Members of a fire department, lawyers, doctors, dentists, and teachers are entitled to be excused from serving on the jury. The purpose of the law is obvious and I do not need to explain that. Business reasons are not an excuse for not serving on the jury. Such reasons may be considered by the Court in case of an emergency. If you are 60 years of age, or more, you are entitled to be excused.

Are there any person on this panel of 38 who desire to be excused at this time? If so, you may come forward and let me hear from you.

(Seven jurors stepped forward and presented reasons to the Court for not serving on the jury, after which two of the jurors were excused by the Court.)

The Court: Mr. Graff, do you have something?

Mr. Graff: May I hand the Court some proposed questions?

The Court: Yes.

(At this point the following proposed questions were handed to the Court.)

PROPOSED QUESTIONS TO JURY PANEL

In addition to the usual questions inquiring concerning the place of residence, the business, and questions of a similar nature, submission of the following questions is requested by and on behalf of the defendant.

Q. What Twin City newspapers, if any, do you subscribe to or read?

Q. How long have you been such a subscriber or reader?

Q. As such subscriber or reader have you on any occastion seen or read anything concerning this case?

Q. As such subscriber or reader have you on any occasion seen or read anything concerning the defendant, Thomas W. Banks?

Q. Have you read or seen anything pertaining to this case in any other newspapers, magazines, books, periodicals or other publications?

Q. Have you read or seen anything pertaining to the defendant, Thomas W. Banks in any other newspapers, magazines, books periodicals or other publications?

Q. Have you heard any radio broadcasts concerning this case?

Q. Have you heard any radio broadcasts concerning the defendant, Thomas W. Banks?

Q. Have you seen any telecasts concerning this case or any person connected with it including the defendant, Thomas W. Banks?

Q. Have you heard anyone talk about this case?

Q. Have you heard anyone talk about the defendant?

Q. Have you heard any discussion between any persons concerning this case?

Q. Have you heard any discussion between any persons concerning this defendant?

Q. Have you participated in any such discussions concerning this case?

Q. Have you participated in any such discussions concerning the defendant?

Q. Have you discussed this case with any other prospective juror?

Q. Have you ever been present at any political, fraternal, social or civic meeting or assemblage when any address or talk was delivered or had concerning the defendant, Thomas W. Banks, or this case?

Q. Have you ever heard, read or received any information concerning any such address or talk delivered or had at any such political, fraternal, social or civic meeting or assemblage concerning the defendant, Thomas W. Banks, or this case?

Q. Has anyone claimed or represented to you that he or she has any confidential information concerning this case or this defendant?

Q. Has anyone expressed any opinion to you concerning the facts of this case?

Q. Has anyone expressed any opinion to you concerning the guilt or innocence of the defendant?

If the answer to either of the two preceding questions is yes, we ask that such prospective juror then be asked:

Q. Did such person claim to have official or confidential information to support such opinion?

Q. Based upon any information of any nature that has come to you by any means from any source concerning this case or the defendant have you had or do you now have an opinion concerning the facts in this case?

Q. Based upon any information of any nature that has come to you by any means from any source concerning this case or the defendant have you had or do you now have an opinion concerning the guilt or innocence of the defendant?

Q. Do you at this time have or indulge any prejudice or bias which would prevent you from acting as a fair and impartial juror in this case?

Q. It may appear in the trial of this case that a portion of the income of the defendaat was derived from liquor and wagering activities. If it so appears, would such evidence standing alone and of itself create a prejudice or bias that will prevent you from being a fair and impartial juror?

Q. Do you have or are you aware of any prejudice or bias in this type of case as distinguished from any other so-called criminal case?

Q. Are you now or have you ever been employed by the United States, or any agency or instrumentality thereof?

Q. Is or has any member of your family been employed at any time by the United States, or any agency or instrumentality thereof?

Q. Have you ever been or are you now engaged in any law enforcement work?

Q. Is or has any member of your family been engaged in law enforcement work?

Q. Are you now or have you ever been employed by any state or any agency or instrumentality thereof?

Q. Is or has any member of your family ever been employed by any state or any agency or instrumentality thereof?

Q. Are you personally acquainted with any person employed by the Bureau of Internal Revenue?

Q. Are you personally acquainted with any person engaged in investigatorial work for the United States or any state government?

Q. Are you acquainted with any of the persons employed in the office of the United States Attorney in Saint Paul?

Q. Have any of the attorneys in that office ever represented you or members of your family or your employers in any professional capacity?

Q. Are you personally acquainted with George McKusick of the Bureau of Internal Revenue?

Q. Are you personally acquainted with Agent Kleven of the Internal Revenue Department?

Q. Are you personally acquainted with Arthur B. Stone of the Bureau of Internal Revenue?

Q. Have you ever been a member of any state or federal grand jury?

Q. Have you ever acted as a state or federal petit juror?

Q. If you have had previous jury experience was such previous jury experience in the state or federal courts or both?

Q. If you have had previous jury experience, have you ever sat upon the trial of a criminal case?

Q. If you have had previous federal jury experience, when did you last serve?

Q. Would the fact that this criminal prosecution is brought in the name of the United States in and of itself, standing alone, create any prejudice or bias which would prevent you from being a fair and impartial juror?

The Court is requested to advise the prospective jurors:

(1) That the indictment is merely the formal charge which has been placed against the defendant and is not any evidence of guilt and is not to be considered as such by the jury.

(2) Concerning the presumption of innocence with which the law surrounds any person accused of an offense.

(3) That the burden of proof is upon the government to prove the guilt of the defendant beyond a reasonable doubt.

That after the Court has explained the foregoing provisions of law concerning these matters to the prospective jurors the Court is requested to ask the jurors whether they

will follow these provisions of law in the determination of the issues of this case.

HOFFMANN, DONAHUE & GRAFF
JOHN W. GRAFF
Attorneys for Defendant
1220 Minnesota Building
Saint Paul 1, Minnesota

The Court: Mr. Clerk, you may call 28 jurors.

Now, answer as your names are called so we can hear you, so the Clerk will know that you are responding, and come forward and have seats in the jury box as directed by the Bailiff.

(The following 28 jurors were called to sit on the panel:

Mrs. Alice F. Pfeiffer, St. Paul

Charles Rea, Red Wing

Gustav A. Peterson, St. Paul

Leo Leonard Ament, West St. Paul

Gunnard F. Nelson, St. Paul

John J. O'Connell, St. Paul

Edward J. Schoch, St. Paul

Willard W. Baker, South St. Paul

David Gutsche, St. Paul

Edward Anthony Murray, St. Paul

Erick R. Kempe, West St. Paul

Mrs. F. W. Benjamin, Hastings

Anthony C. Thorsen, St. Paul

Allen M. Bullock, St. Paul

Arthur Paymar, St. Paul

Kermit Bailey, South St. Paul

Mrs. Lois F. Larsen, St. Paul

Bernard V. Minea, St. Paul

George B. Muellner, St. Paul

Leonard O. Neilson, St. Paul

Leon Hayward, Pine Island

Mrs. May R. Ganfield, Hastings

H. V. E. Johnson, Cannon Falls

Lester J. Gilbert, St. Paul

Milton W. Baumann, South St. Paul

Lloyd A. Davis, South St. Paul

Adrian G. Carlson, St. Paul

Theodore H. Palmer, St. Paul

The Court: (To the Clerk) You may swear the panel.

(The jury panel was duly sworn.)

The Court: Ladies and gentlemen of the panel, as you have been told, this is the case of the United States of America vs. Thomas W. Banks. The defendant is charged in an indictment in this case, filed January 14, 1952, with what is commonly called tax evasion, in which he is charged with evading a portion of his taxes due for the years 1945, '46, and '47. Is the defendant present?

Mr. Graff: Yes, Your Honor.

The Court: He may arise.

(Mr. Banks arose.)

The Court: You may be seated. The defendant has arisen in the court room. The defendant is represented

by Mr. John W. Graff, sitting at the counsel table almost opposite me, by Mr. Richard Kyle, and Mr. Jerome Hoffmann, the three lawyers sitting along counsel table in a row to the left of the defendant.

The United States is represented by Mr. C. U. Landrum, and Mr. Miles W. Lord sitting at his left. Mr. Landrum sits almost across the counsel table from me; and Mr. Richard Buhrman. Mr. Philip Neville is the United States Attorney for the State of Minnesota. He will not be in the active trial of this case?

Mr. Landrum: I think not, Your Honor.

The Court: Very well. He isn't present at this time.

(To the jury panel.) Do any of you know the defendant, the gentleman who arose in the court room a moment ago? If so, raise your hands.

(No response.)

Do you know Mr. Graff, who sits at the counsel table? If so, raise your hands.

(No response.)

Do you know Mr. Hoffmann, who sits next to Mr. Graff at the counsel table? If so, raise your hands.

(No response.)

Do you know Mr. Richard Kyle, who practices law here in St. Paul—well, all three of these lawyers practice in St. Paul. Are you acquainted with Mr. Kyle?
If so, raise your hands.

(No response.)

Are any of you acquainted with Mr. C. U. Landrum? If so, raise your hands.

(No response.)

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Are you acquainted with Mr. Lord, Assistant United States Attorney for Minnesota?

(No response.)

Are you acquainted with Mr. Philip Neville, the United States Attorney for the State of Minnesota? If so, raise your hands.

(No response.)

How many of you have heard about this case? Raise your hands.

(Approximately fifteen hands raised.)

How many have talked to anybody about this case at any time in the past?

(One hand raised.)

By the Court:

Q. What is your name?

A. Bernard V. Minea.

Q. Have you talked to anybody who claimed to know anything about the facts in this case?

A. No, Your Honor, I have not.

Q. You have just visited with other citizens about it?

A. Just from seeing newspaper comments, and things of that type,—just general conservation.

Q. You have read about it in the newspaper?

A. That is all.

Q. Have you expressed an opinion to anyone about whether this defendant was innocent or guilty?

A. I have not.

Q. No one has expressed that sort of an opinion to you about this case?

A. No, they have not.

Q. You have no opinion at this time as to whether he is guilty or innocent?

A. None, Your Honor.

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Q. You did not form an opinion from what you read in the newspapers or what you have heard about it?

A. None at all.

Q. You feel that you are free, so far as your information is concerned, to serve on this jury, hear the evidence and the instructions of the Court, and decide this case fairly and impartially between the parties?

A. Yes, Your Honor.

Q. When you held up your hand, you meant that you read about the case, or that you had heard about it on the radio—

A. Well, the firm I am employed by, we had a summons, or whatever you might call it, for testimony in this trial,—or some of our records, rather.

Q. Some of your records?

A. Yes, sir.

Q. You have not been called as a witness, of course?

A. No, Your Honor.

Q. What firm are you with?

A. First National Bank, St. Paul.

Q. Some of the officers or employees of your bank have been called here as a witness in this case?

A. Yes, Your Honor.

Q. That is because of their connection with the banking business?

A. That is right.

Q. Their familiarity with what the records of the bank show?

A. That is right.

Q. The fact that they appear in this case would not influence you if you were serving on this jury?

A. Not at all.

The Court: (To the jury panel) I think I stated to you that three lawyers representing the defendant in this case are attorneys of St. Paul. Have they ever represented any of you? Is there any member of this panel who has

ever been represented in legal matters by Mr. Graff, Mr. Hoffmann, or Mr. Kyle? If so, raise your hand.

(No response.)

I might have concluded that because none of you seem to be acquainted, personally acquainted with these lawyers. But I wanted you to to tell me whether or not these lawyers have ever represented any of you in any manner. I think I asked you if you knew this defendant and none of you raised your hand.

I just want to say that I am not asking these questions to pry into your business or into your affairs in any way. I am simply asking these questions so that counsel for the respective parties in this case may know something of your experience in life and in business affairs in this country, so that they may judge in a measure whether or not you are unbiased, unprejudiced citizens, and qualified in every respect to serve on this jury. These parties are both entitled to men and women of honor and integrity, who are unbiased and unprejudiced and qualified in every respect to serve on this jury.

I shall ask you a number of questions generally. I think these questions properly may be presented. You will listen to them and undertake to make careful answers.

Has any member of your family ever been employed by the United States, or any agency or instrumentality thereof? If any of you have a member of your family employed by the United States—

Juror Gilbert: Not at the present time, Your Honor.

The Court: Not at the present time?

Juror Gilbert: No, sir.

The Court: Your name and address?

Juror Gilbert: Lester J. Gilbert, 518 South Saratoga.

The Court: A member of your family was employed by the United States?

Juror Gilbert: That is right,—Post Office Department.

The Court: He is not now?

Juror Gilbert: No, sir.

The Court: No member of your family is employed by the United States at this time?

Juror Gilbert: Not at this time.

The Court: How long was he employed in the Postal Department?

Juror Gilbert: Oh, he did temporary duty of about two months, I would say,—something like that.

The Court: How long ago has that been?

Juror Gilbert: A year ago.

The Court: Would that influence you in this case?

Juror Gilbert: No, sir.

The Court: You may be seated.

Juror Minea: Would the fact that I have a son in the armed forces—would that be employed by the Government?

The Court: You have a son in the armed forces?

Juror Minea: Yes, Your Honor.

The Court: Where is he now serving?

Juror Minea: He is in the Presideo, San Francisco.

The Court: How long has he been in the service?

Juror Minea: Oh, about fifteen months.

The Court: Has he been abroad during that time?

Juror Minea: No, he has not.

The Court: What department of the service is your son in?

Juror Minea: In the military police.

The Court: What is his age now?

Juror Minea: 22.

The Court: Is there any other member of your family in the Government service in any way?

Juror Minea: Not now. I had another son who was in the last war.

The Court: He is not now in the military forces of this country?

The Court: Would the fact that you have a son serving in the military forces of the country at this time influence you in this case?

Juror Minea: Not at all.

The Court: You feel you could hear the evidence and decide this case fairly and impartially between these parties?

Juror Minea: Yes, I can.

The Court: (To the juror Larsen) You are holding your hand up?

Juror Larsen: I have two sons in the United States Army.

The Court: Where are they?

Juror Larsen: I have one in the Air Force in Texas, Fort Worth, and one at Fort Benning, Georgia.

The Court: Your name and address?

Juror Larsen: Mrs. Lois F. Larsen.

The Court: They are young men?

Juror Larsen: Yes,—21 and 20.

The Court: Would that influence you in this case?

Juror Larsen: No, sir.

The Court: You can hear this evidence, the instructions of the Court, and decide this case fairly between these parties?

Juror Larsen: Yes, sir.

Juror Ganfield: Your Honor, I have a son in the Navy.

The Court: How long has he been in the Navy?

Juror Ganfield: Since last January. In World War II he served twelve months also in the Navy.

The Court: He had served twelve months already?

Juror Ganfield: Yes.

The Court: Where is he now?

Juror Ganfield: At San Diego, in the Naval Base.

The Court: That is the only member of your family in the Government service in any way?

Juror Ganfield: At present. Another son served in World War II also.

The Court: He is not in the Army now?

Juror Ganfield: Not at the present time, no.

The Court: Where is he?

Juror Ganfield: He is employed in St. Paul now. He is not now in the service.

The Court: I see. Would the fact that you have a son in service and had another son in the service during the Second World War influence you in this case?

Juror Ganfield: I do not feel so.

The Court: You feel you can hear the evidence in this

case and decide it fairly and impartially between the parties?

Juror Ganfield: I do.

Juror Baker: I understood your first question, Your Honor, to be—Had you ever, had any of your relatives ever been employed in the Government service? My father was in the Government service in the Department of Agriculture. He is retired and deceased.

The Court: He is not now living?

Juror Baker: No.

The Court: Where was he stationed?

Juror Baker: About a year and a half all over the country, but the last station was here in South St. Paul. He transferred around quite often.

The Court: Your name is—

Juror Baker: W. W. Baker.

The Court: That is the only member of your family who has been employed by the United States?

Juror Baker: Yes.

The Court: And he was in the Agricultural Department, as I understood you?

Juror Baker: Yes.

The Court: For a period of time?

Juror Baker: Yes, sir—35 or 40 years.

The Court: I see. Well, you are not employed by the Government?

Juror Baker: No, sir.

The Court: You never have been?

Juror Baker: No.

The Court: Would the fact that your father was employed by the Government influence you in this case?

Juror Baker: Not in the least.

(Juror David Gutsche holds up hand.)

The Court: What is your name and address, please?

Juror Gutsche: David Gutsche.

The Court: Where do you live?

Juror Gutsche: St. Paul,—1011 Margaret Street. I had two sons in the war the last time—

The Court: But not at the present time?

Juror Gutsche: No, —when the war quit they come home.

The Court: Would that influence you in this case?

Juror Gutsche: No, not at all, Your Honor.

The Court: You can hear the evidence and decide fairly and impartially between these parties, can you?

Juror Gutsche: That is right.

The Court: You have no sons in the service now?

Juror Gutsche: No.

The Court: Is any member of your family engaged in law enforcement work?

Juror Gutsche: No.

The Court: (To the jury panel) I am asking that question of all of you. That is a general question. Are you engaged in law enforcement work?

(No response.)

Are any of you engaged in law enforcement work like employment in the Federal Bureau of Investigation, or the

Alcohol Tax Unit? Once upon a time it was in the prohibition service. Now, have you ever been or are you now engaged in law enforcement work?—that is the question. If so, raise your hand.

(No response.)

Are you now or have you ever been employed by any state, or any agency or instrumentality of any state? If so, raise your hand.

(No response.)

Are you personally acquainted with any person employed by the Bureau of Internal Revenue?

(Two hands were raised.)

The Court: What is your name and address?

Juror Bailey: Kermit Bailey, 708 Marie Avenue, South St. Paul.

The Court: Who do you know who is employed at the Interanl Revenue Department?

Juror Bailey: Wallace Benson. He is a Collector of Internal Revenue.

The Court: How long have you known him?

Juror Bailey: Fifteen years, approximately.

The Court: You just met him in connection with his duties—

Juror Bailey: (Interposing) I consider him a personal friend of mine. I worked with him at one time before he went into the service.

The Court: Well, would the fact that he works for the Internal Revenue and you know him and consider him your personal friend, —would that influence you in this case?

Juror Bailey: No, Your Honor.

The Court: It wouldn't be embarrassing to you to return a verdict against a defendant charged with a violation of the revenue laws if you believed it to be proper?

Juror Bailey: No, Your Honor.

The Court: (To juror Minea) Now, you held up your hand?

Juror Minea: I know George Anderson down at the Internal Revenue Department and also Gerry, the cashier, down there.

The Court: Would that influence you in this case?

Juror Minea: Not at all.

The Court: You would not be inclined to favor the Government in this case because this gentleman in the Internal Revenue Department is an acquaintance of yours?

Jurior Minea: No, I would not.

The Court: Is he just an acquaintance or would you call it a warm friendship existing between you?

Juror Minea: Well, I have known George Anderson for thirty years or more, been a friend of his, —nothing recent at all.

The Court: Nothing recent?

Juror Minea: I see him, but that is all.

The Court: You have known him for all these years but you are not related in any way?

Jurior Minea: Not at all.

The Court: Would your acquaintanceship with him enter into your consideration of this case if you were selected on this jury?

Juror Minea: Not a bit.

The Court: (To the jury panel) Are you personally

acquainted with any person engaged in investigatorial work for the United States or any state government? If so, raise your hand.

(Juror Allen N. Bullock raises hand.)

The Court: Your name?

Juror Bullock: My name is Bullock, —A. N. Bullock, 262 Marshall. I know a gentleman with the FBI.

The Court: How long have you known him?

Juror Bullock: About five years, sir.

The Court: Where is he stationed?

Juror Bullock: He is in the Twin Cities.

The Court: Connected with the Twin City offices?

Juror Bullock: Yes, sir.

The Court: He is not related to you?

Juror Bullock: No, sir.

The Court: Is it just an acquaintanceship, or is it a friendship that exists between you?

Juror Bullock: Well, he and his family own the apartment in which we live,—own the building.

The Court: Sort of a business contact, is it?

Juror Bullock: Not particularly business, no, sir,—more social than business.

The Court: You know him, then?

Juror Bullock: Yes, sir.

The Court: You have for five years?

Juror Bullock: Yes, sir.

The Court: Would that influence you in this case?

Juror Bullock: No, sir, it would not.

The Court: You could hear the evidence and decide this case fairly between the parties, irrespective of your acquaintanceship or friendship with this party?

Juror Bullock: I could, yes, sir.

The Court: Is there anyone else?

Juror Minea: Your Honor, I know John McGowan, the United States Marshal. Was that the question that you asked, —along that line?

The Court: Well, are you personally acquainted with any person engaged in investigatorial work for the United States, or any state government? That is the question.

Well, your acquaintanceship with Mr. McGowan, the fact that he is the United States Marshal, would that influence you in this case?

Juror Minea: Not at all.

The Court: Now, there was some other—

Juror Murray: (Interposing) I know John McGowan.

The Court: Your name is—

Juror Murray: Edward Murray.

The Court: Yes. How long have you known Mr. McGowan?

Juror Murray: About ten years.

The Court: He is a personal friend of yours?

Juror Murray: No.

The Court: Just an acquaintanceship?

Juror Murray: Yes.

The Court: Would that influence you in this case?

Juror Murray: No, not at all.

The Court: (To the jury panel) Are you acquainted with any of the persons employed in the United States Attorney's office in St. Paul? If so, raise your hand?

(No response.)

Have any of the attorneys in that office ever represented you, or the members of your family, or your employers in any professional capacity? If so, raise your hand.

(No response.)

Are you personally acquainted with George McKusick of the Bureau of Internal Revenue? If so, raise your hands.

(No response.)

Are you acquainted with Agent Kleven of the Internal Revenue Department?

(No response.)

Are you acquainted with Arthur B. Stone of the Bureau of Internal Revenue? If so, raise your hand.

(No response.)

Have you ever been a member of any State or Federal Grand Jury? If so, raise your hand.

(One hand raised.)

The Court: I see just the one hand. And what is your name?

Jurea Rea: Charles Rea. In 1946 I was on the Federal Grand Jury.

The Court: In 1946?

Juror Rea: Yes.

The Court: You were on the Federal Grand Jury here in St. Paul?

Juror Rea: Yes, sir.

The Court: Is that the only time you were ever on a Federal Grand Jury?

Juror Rea: That is, yes, sir.

The Court: That was about six years ago?

Juror Rea: Six years ago,—1946.

The Court: How long did you serve?

Juror Rea: I forget now whether it was two or three sessions.

The Court: Two or three different sessions?

Juror Rea: Yes, sir.

The Court: Would that influence you in this case?

Juror Rea: No, sir.

(Juror David Gutsche raises hand.)

The Court: Now, your name again?

Juror Gutsche: David Gutsche. I was on the jury the same time as Mr. Rea was.

The Court: You served on the Grand Jury?

Juror Gutsche: The same time Rea was.

The Court: Is that the only time you ever served on a Grand Jury?

Juror Gutsche: I was once before but I forget what year it was. It was before this last one.

The Court: Was it in this court?

Juror Gutsche: It was in—

The Court: Was it in the State Court?

Juror Gutsche: Yes, but this last time I was on the same jury with Mr. Rea.

The Court: Well, that was in the Federal Court, as I understand you, Mr. Rea?

Juror Rea: Yes, sir.

Juror Gutsche: That is where I was in '46.

The Court: You just served the one time on the Federal Grand Jury, did you, Mr. Rea?

Juror Rea: Yes, just on the one panel. It was three different sessions, I believe.

The Court: Do you remember this juror serving with you on that Grand Jury?

Juror Rea: Yes, sir.

The Court: Very well. (To the jury panel) Have you ever served on a petit jury in any state court? If so, raise your hand.

(Approximately ten hands were raised.)

The Court: I think I will not make further inquiry at this time about that. How many have served on the petit jury in this court, the Federal Court, before? Raise your hands.

(Four hands were raised.)

The Court: I see four hands. Now, how many have served on a petit jury in the State Court,—the State District Court? Raise your hands again, all of you who have served in the State District Court on a petit jury.

(Six hands were raised.)

The Court: Half a dozen. Have you ever served on the trial of a criminal case? If so, raise your hand?

(Three hands were raised.)

The Court: Your name is—

Juror Bailey: Kermit Bailey, 708 Marie Avenue, South St. Paul.

The Court: You served on a jury in a criminal case?

Juror Bailey: Yes, Your Honor.

The Court: In the Federal Court or State Court?

Juror Bailey: Federal Court.

The Court: In the Federal Court?

Juror Bailey: Yes, Your Honor. I don't remember whether it was '46 or '47,—it was shortly after I got out of the service.

The Court: You served in this court, did you?

Juror Bailey: Judge Donovan's, I believe.

The Court: Judge Donovan held the court?

Juror Bailey: Yes, Your Honor.

The Court: Yes, but you served in it?

Juror Bailey: Yes, sir.

The Court: That has been five or six years ago?

Juror Bailey: Yes, Your Honor. I don't remember the exact date.

The Court: Do you remember the case you served on?

Juror Bailey: Yes, it was a White Slave case.

The Court: I see. Is that the only criminal case you ever served on in this court?

Juror Bailey: Yes, Your Honor.

The Court: Now, you served—

Juror Minea: (Interposing) The criminal case I served on was in the Ramsey County District Court.

The Court: Just the one case?

Juror Minea: One criminal case, Your Honor.

The Court: How long ago has that been?

Juror Minea: About twenty years ago.

The Court: You haven't served within that time?

Juror Minea: Not on a criminal case.

The Court: Has anyone else served on a criminal case?

Juror Baumann: The District Court in Goodhue County.

The Court: The District Court in Goodhue County?

Juror Baumann: That is right.

The Court: You served on a criminal case?

Juror Baumann: That is right.

The Court: How long ago has that been?

Juror Baumann: About fifteen years ago.

The Court: And your name, for the benefit of counsel—

Juror Baumann: Milton Baumann is the name.

The Court: Is there anyone else?

(No response.)

The Court: Mr. Baumann, how long ago has it been since you served on that jury?

Juror Baumann: Fifteen years.

The Court: Fifteen years. (To the jury panel) How many have served on any jury within the last five years? Raise your hands.

(Four hands were raised.)

The Court: Now, would the fact that this criminal pros-

ecution is brought in the name of the United States in and of itself, standing alone, create any prejudice or bias which would prevent you from being a fair and impartial juror? If so, raise your hand.

(No response.)

This defendant is presumed to be innocent until he is proved guilty by evidence which convinces you beyond a reasonable doubt of his guilt. Is there anyone on this panel who for any reason would not give the defendant the benefit of the presumption of innocence and require the Government to prove him guilty beyond a reasonable doubt before agreeing to a verdict of guilty? If so, raise your hand.

(No response.)

Is there any member of this panel who is of the opinion that you would not feel justified in finding a person guilty under any circumstances, even though you believed beyond a reasonable doubt that the defendant was guilty,—in the trial of the case you would not feel you could join in a verdict finding such person guilty? If anyone has that opinion, it would be as extreme as refusing to give the defendant the benefit of the presumption of innocence. If you have that opinion, raise your hand.

(No response.)

In other words, if you believed this defendant from the evidence in the case guilty beyond a reasonable doubt, it is the duty of the jurors courageously to say so by a verdict of guilty; on the other hand, if you are not convinced beyond a reasonable doubt that he is guilty, it is your duty courageously to say so by a verdict of not guilty.

By the Court:

Q. Mrs. Alice F. Pfeiffer, you live in St. Paul?
A. Yes, sir.

Q. Now, speak so I can hear you. It is difficult to hear in this room. What is your residence address?

A. 2351 Chilcombe Avenue.

Q. How long have you lived in St. Paul?

A. All my life.

Q. Are you in business or are you employed in any way?

A. No.

Q. You keep the home?

A. Yes.

Q. Are you married?

A. Yes.

Q. Do you have any children?

A. Yes.

Q. How many children?

A. One.

Q. There is no illness in your family?

A. You mean at the present time?

Q. I mean serious illness at the present time?

A. No, Your Honor.

Q. You have served on juries before?

A. No, Your Honor, but I received a jury summons for, I think, the District Court of the County for May 12th past and I asked to have it deferred because I had to be out of town at that time. It has been deferred but I will be called in June. I don't know whether that is of any interest to you or not. I mean, is there a possibility that this case might run into that summons?

Q. Oh, I would guess not, although that would be speculation.

A. And would I really have to serve twice in succession like that if—

Q. No, I think if you serve in this court for a substantial period of time, the State Court will excuse you.

A. (Continuing) You see, I received that summons first, Your Honor.

Q. Yes.

A. (Continuing) And was excused until June,—or deferred until June before I got this summons.

Q. Well, you can telephone the Judge in charge down there that you are serving on this jury and you will be excused. There is no question about that, I am sure. You have not heard about this case?

A. No. I have read something about it in the newspapers, of course.

Q. You have read something about it in the papers?

A. Surely.

Q. What papers do you read?

A. The Minneapolis Tribune and the St. Paul Dispatch.

Q. You have read about this case in those newspapers?

A. Yes, sir.

Q. From what you have read, have you formed any opinion as to the guilt or innocence of this defendant?

A. No, sir.

Q. It was just newspaper material, so far as you were concerned?

A. That is right.

Q. You feel that you can hear the evidence in this case and the instructions of the Court and join in a fair and impartial verdict in this case?

A. That is right.

Q. Do you know of any reason why you can't do that?

A. No.

Q. No one has talked to you about this case?

A. No.

Q. No one who claimed to know the facts about it has told you about it at any time?

A. No.

Q. Have you served on a jury in Federal Court before?

A. No.

Q. This is the first time you have ever been employed on a petit jury?

A. Yes.

Q. You have never served on a grand jury?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No.

Q. (To Juror Rea) Charles Rea, you live at Red Wing?

A. Yes, sir.

Q. How long have you lived there?

A. Fifteen years, Your Honor.

Q. Your occupation?

A. I am in the sign business.

Q. And you have been for about 25 years?

A. That is right, sir.

Q. You are married and have—

A. (Interposing) Two children.

Q. Two children?

A. Yes.

Q. You have served on juries before?

A. Just the grand jury.

Q. The grand jury in this court?

A. In this court.

Q. Have you ever served on a grand jury or a petit jury in the State Court?

A. No, Your Honor.

Q. You have read about this case in the newspapers?

A. No, I am afraid not. All I know of it I have heard on the radio.

Q. Do you not remember of reading anything about it, anyway?

A. I haven't paid any attention. I haven't been interested in it.

Q. Did I understand that you haven't heard about it on the radio?

A. I have heard of it on the radio, but that is all.

Q. You have heard of it on the radio?

A. I haven't read anything in the paper about it.

Q. Have you talked to anybody who claimed to know anything about it?

A. No.

Q. You have not discussed it with anyone? A. No.

Q. Well, from what you have heard about it, have you formed any opinion as to whether this man is guilty or innocent?

A. No, I haven't.

Q. You have no opinion at this time one way or the other?

A. None whatever.

Q. You have lived in Red Wing all this 25-year period?

A. No, 15 years. I lived in Minneapolis previous to that.

Q. I see. How long did you live in Minneapolis?

A. 15 years.

Q. And that was up to about 15 years ago?

A. That was up to 1936,—the fall of '36.

Q. You do not know any of these parties whom I have mentioned, the lawyers for the defendant or anyone connected with this case?

A. No, Your Honor.

Q. These Internal Revenue employees or officers, you are not acquainted with any of them?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't.

To Juror Alice F. Pfeiffer:

Q. (By the Court) Mrs. Pfeiffer, I neglected to ask you what your husband's occupation is?

A. He is a Professor at the University of Minnesota.

Q. What department does he serve in over there?

A. The German Department.

Q. He speaks German, reads and writes the German language?

A. That is right.

Q. How long has he been at the University?

A. 22 years, I believe.

Q. That is his business, is it, exclusively—that is, acting as Professor at the University of Minnesota?

A. That is right.

Q. And he has been acting there for about twenty years?

A. 22, I think.

Q. 22 years? A. Yes.

To Juror Gustav A. Peterson:

Q. (By the Court) Gustav A. Peterson, you live in St. Paul?

A. Yes, sir.

Q. How long have you lived there?

A. As long as I have lived.

Q. All your life? A. Yes.

Q. What is your residence address? A. 1240 Asuland.

Q. What is your occupation? A. Sheet metal worker.

Q. Are you with one of the companies here in town?

A. Yes, sir, with Axel Newman Heating & Plumbing.

Q. How long have you been with that concern?

A. I have only been with that concern since the first of the year.

Q. What concern were you with before that?

A. Neil & Hubbard.

Q. How long were you with that company?

A. Two years.

Q. What business were you connected with before that?

A. Stewart Sheet Metal.

Q. You were still in the sheet metal business?

A. Yes, sir.

Q. You are married and have a family?

A. Yes, sir,—three daughters.

Q. Are they at home?

A. Two are married and one is home.

Q. Did you ever serve on a jury in this court before?

A. Not in this court.

Q. You have in the State Court?

A. Yes, sir, three times.

Q. Have you heard about this case? A. No, sir.

Q. You haven't been reading about it?

A. No—I heard my wife make mention of it one day but I didn't pay much attention. I was reading something else at the time.

Q. You were interested in something else?

A. That is right.

Q. You didn't find out anything about this case then?

A. No, I didn't.

Q. You have no opinion about it one way or the other at this time?

A. No, sir.

Q. Did you ever serve on a criminal jury,—a jury that tried a criminal case?

A. No, sir.

Q. You have served on civil cases? A. That is right.

Q. In the State Court? A. Yes, Your Honor.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, Your Honor.

Q. You do not know any of these parties, the lawyers or the defendant?

A. No, sir.

Q. Do you know any of the Internal Revenue employees or agents whom I have mentioned in this case?

A. No, sir.

Q. Have you had any difficulty with the Government at any time in the past in tax matters?

A. No, sir.

Q. You said you were a sheet metal worker?

A. Yes, sir, with the Axel Newman Plumbing & Heating at present.

Q. They are here in St. Paul?

A. Yes, sir,—up on Como Avenue across from the Fair Grounds.

To Juror Charles Rea:

Q. (By the Court) Mr. Rea, were there tax cases presented to the Grand Jury while you were serving on the Grand Jury?

A. Yes.

Q. There were tax cases presented at that time?

A. Yes, sir.

Q. Some indictments were returned at that time?

A. Yes, sir.

Q. Do you remember how many?

A. That I don't, no.

Q. You do not remember how many?

A. I don't remember how many.

Q. Or the cases in which indictments were returned?

A. I believe one was a dentist here or a doctor in Minneapolis—I don't recall the name now.

Q. That is about as much as you remember about it at this time, after five or six years, I suppose?

A. Well, we had some other cases that I have a better memory of than that. I believe that you could say they were more interesting.

Q. Very well; we will not go into too many of those at this time.

To Juror Leo Leonard Ament:

Q. (By the Court) Leo Leonard Ament?

A. Yes, Your Honor.

Q. You live in West St. Paul? A. For twelve years.

Q. What is your street address?

A. 1173 Charlton Street.

Q. How long have you lived in St. Paul, or West St. Paul?

A. All my life.

Q. I beg your pardon?

A. In St. Paul and West St. Paul all my life.

Q. What is your occupation?

A. I work for Farwell, Ozmun, Kirk Company.

Q. How long have you been with that company?

A. 22 years.

Q. What is your work? A. Stock supervisor.

Q. That is in their St. Paul place of business? A. Yes.

Q. You are married and have a family?

A. Yes, Your Honor, three children.

Q. Have you ever served on a jury in this court before?

A. Five years ago,—five or six years.

Q. Did you serve on any criminal cases?

A. No, I have not.

Q. Did you ever serve on a Grand Jury in this court?

A. No, Your Honor.

Q. Have you ever served in the State Courts? A. No.

Q. Have you heard about this case in any way?

A. Never paid no attention to it.

Q. You have no information about it at this time?

A. No, Your Honor.

Q. You have never talked to anybody about it? A. No.

Q. No one ever told you about it who claimed to know the facts about it?

A. No, Your Honor.

Q. Do you know any of the parties connected with this case?

A. No, I do not.

Q. Or the employees or agents of the Internal Revenue office?

A. No, I do not.

Q. Have you ever had any difficulty with the Government over any tax matters?

A. No, I haven't.

Q. Or the State? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't.

To Juror Gunnard F. Nelson:

Q. (By the Court) Mr. Nelson— A. Yes, sir.

Q. You live in St. Paul? A. All my life.

Q. You have lived here all of your life?

A. That is right.

Q. What is your occupation?

A. Chief rate clerk, Passenger Traffic Department, Great Northern Railroad.

Q. How long have you been with the Great Northern?

A. Forty years.

Q. Do you know any of the parties connected with this case?

A. No, sir.

Q. Have you heard about it in any way? A. No, sir.

Q. You have not read about it in the newspapers?

A. No, sir.

Q. You have never talked to anyone who claimed to know the facts in the case?

A. No, sir.

Q. And you have not discussed it with anybody at any time?

A. No, Your Honor.

Q. You do not know any of the attorneys? A. No, sir.

Q. Have you served on a jury in this court before?

A. No, sir.

Q. Have you in the State Courts? A. No, sir.

Q. You are married? A. Yes, sir.

Q. Do you have a family? A. Two children.

Q. What is your residence address?

A. 777 East Cottage Avenue.

Q. Do you know any of the officers or employees of the Internal Revenue Department?

A. No, Your Honor.

Q. Now, what is the nature of your work for the Railroad Company?

A. Figuring passenger fares—chief rate clerk.

Q. Chief rate clerk? A. That is right.

Q. And you have been doing that for how many years?

A. Well, I have been with the company forty years, but it is eighteen years now that I have served in that capacity.

Q. That you have been serving as the rate calculator?

A. Yes, sir.

To Juror John J. O'Connell:

Q. (By the Court) Mr. John J. O'Connell, you live in St. Paul?

A. Yes, sir.

Q. How long have you lived here? A. All my life.

Q. What is your occupation?

A. I am treasurer, St. Paul Union Stockyard Company.

Q. How long have you been with the St. Paul Union Stockyard Company?

A. 35 years.

Q. You are married and have a family? A. Three boys.

Q. Are they at home? A. One.

Q. The other two are married? A. Married.

Q. Have you heard about this case in any way?

A. Just on the radio. I have heard it mentioned on the radio. I haven't paid any attention to it.

Q. Did you form any opinion as to whether this defendant was guilty or innocent from what you heard?

A. No, Your Honor.

Q. You know nothing about the case except what you have heard on the radio?

A. That is right.

Q. You have not discussed the case with anyone?

A. No.

Q. No one who claimed to know the facts has told you about the case in any way?

A. No, Your Honor.

Q. No one has talked to you about this case? A. No.

Q. Have you served on juries before in this court?

A. Not in this court.

Q. Have you in the State Court? A. Ramsey County.

Q. Ramsey County District Court? A. Yes.

Q. Do you know any of the parties connected with this case?

A. No, Your Honor.

Q. Do you know any of the officers or employees in the Internal Revenue office?

A. No.

Q. Have you had any tax difficulties with the Federal Government at any time in the past?

A. No.

Q. Or the State Government? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, Your Honor.

To Juror Edward J. Schoch:

Q. (By the Court) Mr. Edward J. Schoch, you live in St. Paul?

A. Yes, sir.

Q. How long have you lived here? A. All my life.

Q. What is your residence address?

A. 251 North County Line.

Q. You are married and have a family? A. Yes, sir.

Q. What is your occupation? A. Grocery business.

Q. You belong to the store that has been in existence for many years in St. Paul?

A. Yes, sir.

Q. The grocery business? A. Yes, sir.

Q. What is the location of your business?

A. Seventh and Broadway.

Q. You are one of the brothers, or a member of the family anyway?

A. Yes, sir.

Q. That conducts that business down there? A. Yes.

Q. How long have you been in the business, Mr. Schoch?

A. That was established in 1858.

Q. Well, that was before your time— A. Yes.

Q. Now, you are married? A. Yes, sir.

Q. Have you heard about this case in any way?

A. No,—I have read a little bit about it in the papers.

Q. Did you form any opinion from what you read about it?

A. No.

Q. You have no opinion one way or the other at this time?

A. No.

Q. Do you know any of these parties? A. No, sir.

Q. The lawyers, or the defendant, or anyone connected with the case?

A. No, sir.

Q. Or any of the agents of the Internal Revenue office?

A. No, sir.

Q. Have you had any tax difficulties with the Federal Government at any time?

A. Oh, I wouldn't say difficulties. I have called up there.

Q. You have had to make out reports? A. That is right.

Q. And you have had to pay taxes? A. That is right.

Q. You haven't had any difficulty other than that?

A. That is all.

Q. Like a great many citizens? A. That is right.

Q. Well, have you had any trouble with the State of Minnesota?

A. No, sir. I haven't paid quite so much to the State perhaps.

Q. You have not heard about this case? A. No.

Q. No one has talked to you about it in any way?

A. No, sir.

Q. You have no opinion one way or the other at this time?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir.

To Juror Willard W. Baker:

Q. (By the Court) Willard W. Baker, you live in South St. Paul?

A. Yes.

Q. How long have you lived there?

A. About four years, sir. But that is one of those things we get our mail from South St. Paul and we live in West St. Paul, so to be correct I live in West St. Paul.

Q. How long have you lived there, did you say?

A. About four years, sir.

Q. Where did you live before that? A. In St. Paul.

Q. How long did you live in St. Paul?

A. Oh, about thirty years.

Q. You are married and have a family? A. Yes.

Q. What is your occupation? A. Steam fitter.

Q. With whom are you—

A. (Interposing) Armour & Company.

Q. How long have you been with that company?

A. Fifteen years.

Q. Have you heard about this case in any way?

A. I read the headlines in the Sunday paper.

Q. Have you any opinion one way or the other at this time?

A. No, sir.

Q. Have you served on juries before? A. Yes, sir.

Q. In this court? A. No, sir.

Q. In the State Court? A. Yes, sir.

Q. Have you served on criminal cases, have you?

A. No, sir.

Q. Have you heard about this case in any way except what you said you read in the newspapers?

A. In the headlines Sunday, yes, sir.

Q. That is all. You didn't hear about it over the radio?
A. No, sir,—I have a farm, too, sir.
Q. Have you had any tax trouble at any time in the past?
A. No, sir.
Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?
A. No, sir.

To Juror David Gutsche:

Q. (By the Court) Mr. Gutsche, you live in St. Paul?
A. Yes, sir, Your Honor.
Q. How long have you lived here? A. Since 1913.
Q. What is your occupation?
A. Interior painter and decorator.
Q. How long have you been in that business?
A. Since 1913.
Q. Ever since you have lived here, then?
A. That is right.
Q. You are married? A. Married.
Q. Do you have a family?
A. Two daughters and two sons. One daughter is home yet.
Q. Are they grown up yet?
A. Yes,—three of them married and one home yet. One girl is home.
Q. Did you ever serve on a jury in this court before?
A. No, except about six years ago on the other side—
Q. Yes, on the Grand Jury? A. Yes.
Q. Well, have you served in the State Court?
A. Once, but I was excused at that time.
Q. What is your business?
A. Interior painter and decorator.
Q. Interior painter and decorator? A. That is right.
Q. Very well. Were you born in this country?
A. No, born in Old Country.
Q. What country? A. Russia.

Q. Russia? A. Yes.

Q. How old were you when you came over?

A. Oh, about—I was young—I was around 19 years, I believe.

Q. 18 or 19 years? A. Yes.

Q. Well, you ought to be a right good citizen by this time.

A. Yes, I have got my citizen papers.

Q. Your children went to school here in the public schools of this country?

A. Yes, that is right. I got my citizen papers.

Q. You are a citizen, are you? A. Yes.

Q. Have you had any tax matters with the Government?

A. No, sir, Your Honor.

Q. Or with the State? A. No, sir, Your Honor.

Q. Have you heard about this case at any time?

A. No, I never paid much attention.

Q. You have no opinion one way or the other now?

A. No, sir, Your Honor.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir, Your Honor.

Q. I say, do you know of any reason why you can't do that?

A. No.

To Juror Willard W. Baker:

Q. (By the Court) I must have overlooked where you live. You said you lived in West St. Paul?

A. Yes.

Q. What is your street address? A. 453 Thompson.

Q. I think that is the thing that is desired. It is 453 Thompson?

A. Yes. To clarify that, I might say that we have a rural route there and West St. Paul hasn't a post office and they get theirs on route 7 from St. Paul and our district gets it from South St. Paul.

Q. I think that street address will serve the purpose.

To Juror Edward Anthony Murray:

Q. (By the Court) Mr. Edward Anthony Murray, where do you live?

A. 1035 North Oxford, St. Paul.

Q. How long have you lived in St. Paul?

A. 29 years, sir.

Q. What is your occupation?

A. I am working in advertising, Brown & Bigelow, in the letter department.

Q. Are you working with some company? A. Yes.

Q. In the advertising business, did I understand?

A. Yes, sir.

Q. What company are you with? A. Brown & Bigelow.

Q. What is the nature of your work with that company?

A. Well, I am supervising a group of people there in the sealing of billfolds and plastic billfolds,—working on lettering.

Q. How long have you been doing that?

A. 27 years.

Q. Are you married?

A. Yes, sir.

Q. How long have you been with Brown & Bigelow?

A. 27 years.

Q. Do you have any children? A. Three.

Q. Have you had any tax difficulty with the United States?

A. No.

Q. Or the State of Minnesota? A. No.

Q. Have you heard about this case in any way?

A. Merely read, I guess, in the headlines in the papers where there was to be some trial.

Q. Have you any opinion at this time one way or the other from what you have heard or read?

A. No, I haven't.

Q. Have you ever served on a jury in this court before?

A. No.

Q. Have you in the State Court? A. Yes.

Q. How long ago? A. 1943.

Q. Was that the last time you served in the State Court?

A. Yes.

Q. You have never served on a Grand Jury?

A. No, I haven't.

Q. You haven't heard about this case—I think I asked you that.

A. Just what I read in the papers.

Q. Yes. And you didn't form any opinion from what you read?

A. No, I didn't.

Q. Has anyone ever talked to you about this case?

A. No, they haven't.

Q. Has anyone ever told you about it who claimed to know about it?

A. No, they haven't.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't know of any reason.

To Juror Erick R. Kempe:

Q. (By the Court) Erick R. Kempe, you live in West St. Paul?

A. Yes, sir.

Q. How long have you lived there? A. 29 years.

Q. 29 years? A. Yes.

Q. What is your occupation? A. Mechanic.

Q. Who for? A. The Streetcar Company.

Q. How long have you been with the Streetcar Company?

A. 27 years.

Q. What is the nature of your work?

A. I am a steel worker.

Q. You have been doing steel work for the Streetcar Company for 27 years?

A. 27 years, yes.

Q. You handle the steel and make the things that it is necessary for the company to have, is that correct?

A. Yes—Well, we build the streetcar, everything.

Q. Yes. You are married? A. Yes, sir.

Q. How many children? A. I have three.

Q. Have you ever heard about this case?

A. No,—just what I read in the paper about it

Q. You have no opinion at this time one way or the other?

A. No.

Q. Did you ever serve on a jury in this court before?

A. Yes, sir.

Q. How long ago?

A. Oh, it was about '45—seven years ago, I think.

Q. Seven years ago?

A. Yes.

Q. Was that the only time you ever served in this court?

A. Yes.

Q. You have never had any tax troubles with the Federal Government?

A. No.

Q. Or the State Government? A. No.

Q. You make your tax returns? A. Yes.

Q. And pay your taxes? A. Yes.

Q. You do not know any of these lawyers?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, Your Honor.

Q. I think I asked you—you haven't talked to anybody about this case?

A. No.

Q. No one has told you about it who claimed to know about it?

A. No.

To Juror Mrs. F. W. Benjamin:

Q. (By the Court) Mrs. F. W. Benjamin, what is your residence address?

A. 501 West Seventh Street, Hastings, Minnesota.

Q. You live down at Hastings?

A. Hastings, yes, sir.

Q. How long have you lived there? A. 23 years.

Q. Are you employed or are you in business on your own account?

A. Not at the present time.

Q. Have you been in the past?

A. Well, for the past three and a half years I have been employed in the City Clerk's Office there.

Q. The City Clerk's Office at Hastings?

A. At Hastings, yes ,sir.

Q. How long were you employed in that office?

A. Three and a half years.

Q. That was up to what time?

A. The 1st of May, just past.

Q. Were you employed anywhere before that time?

A. No, sir.

Q. What is your husand's occupation?

A. He is retired.

Q. What was his occupation when he was active?

A. For the American Telephone & Telegraph Company.

Q. What was his work with that company?

A. They have a sub-station there and he was manager of that place.

Q. He was manager of the sub-station at Hastings?

A. At Hastings.

Q. How long had he been with that company?

A. Oh, about thirty years when he retired.

Q You have not heard about this case in any way?

A. No—just read in the papers.

Q. Have you any opinion one way or the other at this time about this case?

A. I have none.

Q. You have served on juries before?

A. I have been in this court room—this is the third time, Your Honor.

Q. Have you served in the State Court?

A. No.

Q. You have never served on a grand jury?

A. No, I haven't.

Q. You have never had any tax difficulties with the State or Federal Government at any time in the past?

A. No, Your Honor.

Q. Your husband has not? A. No, Your Honor.

Q. No one has ever told you about this case?

A. No, sir.

Q. Or talked to you about it in any way?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I believe not.

Q. You have never served on a criminal case?

A. No, I don't think so.

Q. In any court?

A. I don't think of any criminal cases that I have served on.

Q. You have served on juries in this court before—I think you said you had been here three times?

A. That is right.

Q. They were not criminal cases?

A. I just don't remember what they were. They were mostly car accidents, and so forth.

Q. Some years ago?

A. Yes, the first one was about fifteen years ago,—about ten years ago, the first time.

Q. Ten years ago?

A. And then again about five years later, and then this is the third time.

Q. You do not remember of any criminal cases that you may have served on at that time?

A. I don't think so.

Q. And you haven't served in the State Courts?

A. I haven't.

Q. I believe you said your husband was now retired?

A. Retired, that is right.

Q. And he was a great many years with the Telephone Company?

A. Right.

Q. Manager at Hastings? A. That is right.

Q. Do you have any children? A. One daughter.

Q. Is she at home—

A. She is married and has three children.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I do not.

To Juror Anthony C. Thorson:

Q. (By the Court) Anthony C. Thorsen, will you stand? I can't quite see you.

A. (Juror stands.)

Q. Where do you live, Mr. Thorsen?

A. 1284 Eleanor.

Q. How long have you lived in St. Paul?

A. Oh, about 22 years.

Q. You are married and have a family?

A. Three children.

Q. What is your occupation?

A. I am a maintenance man out at Progress Pattern.

Q. At what place?

A. Progress Pattern, a foundry company.

Q. How long have you been with that company?

A. Well, about a year and a half now.

Q. Before that, what was your work?

A. Well, then I worked for Ford Motor Company.

Q. You were out there—what was it, three and a half years?

A. No, about six years out at Ford Motor.

Q. Six years out there. What kind of work did you do out there?

A. I was a metal finisher out there.

Q. Have you heard about this case in any way?

A. Well, just what I read about it in the paper.

Q. Do you have any opinion one way or the other at this time?

A. No, I don't.

Q. You feel you have not? A. Yes.

Q. You do not know any of these parties?

A. I know Mr. Hoffmann, the attorney.

Q. How long have you known him?

A. Well, I worked down in the Minnesota Building at one time and he had his office down there.

Q. Did he represent you in legal matters?

A. No, he did not.

Q. Did you call at his office?

A. No.

Q. What was your work in that building?

A There I was a fireman and watchman.

Q. How long were you there? A. Twelve years.

Q. You knew him all that time, did you?

A. Most of the time, yes.

Q. Did you know him like you know other tenants in the building.

A. Yes.

Q. About the same way? A. About the same, yes.

Q. You had no business with him at any time? A. No.

Q. Did you ever visit him in his home? A. No, I did not.

Q. And he didn't visit you in your home?

A. No.

Q. Would your acquaintanceship with him influence you in this case?

A. No, I don't believe so.

Q. You have not heard about this case—

A. Just what I saw in the paper.

Q. Except what you read in the newspapers?

A. Yes.

Q. You do not know any of these other parties?

A. No.

Q. The lawyers or the defendant?

A. No, I do not.

Q. Have you ever talked to anybody about this case?

A. No, I haven't.

Q. Has anyone ever told you anything about it?

A. No.

Q. Anyone claiming to know the facts?

A. No.

Q. All you know about this case is what you read in the newspapers?

A. That is right.

Q. And you have no opinion now one way or the other in this case?

A. No, I haven't.

Q. You have served on juries before?

A. No, I haven't.

Q. Not in this court or in the State Court?

A. No.

Q. Have you had any tax difficulties any time in the past?

A. Well, they called me up once and I had to go down there for a check, you know.

Q. They wanted to check up on certain things?

A. Right.

Q. They called you and you went down?

A. Yes, sir.

Q. And they asked you some questions, and did that end its?

A. That was all, yes.

Q. Did you ever have any trouble with the state authorities on taxes?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't.

Q. You may be seated.

To Juror Allen M. Bullock:

Q. (By the Court) Mr. Bullock?

A. Yes, sir.

Q. I think I can see you. A. Thank you.

Q. Your street address? A. 262 Marshall, St. Paul.

Q. How long have you lived in St. Paul?

A. Five years. I came here in the spring of '47.

Q. Where did you live before that?

A. In Missouri,—Independence, Missouri.

Q. That is Truman's town?

A. Yes, sir.

Q. How long had you lived there?

A. Well, I went through school there and left there in—I believe it was in 1924—and after my movings around, I came back there in '42 or'43, I believe it was.

Q. Then you came to St. Paul?

A. Yes, sir.

Q. What is your occupation?

A. Branch manager for the Curtis Circulation Company.

Q. How long have you been with the Curtis people?

A. 29 years in St. Paul.

Q. You are married and have a family?

A. I do, yes. I have a son that is married and away from home.

Q. Yes. Have you heard about this case in any way?

A. Just in passing. I noticed something in the paper yesterday,—the headlines. I did not read the details.

Q. You have no information except what you read in the newspapers?

A. I do not have, no, sir.

Q. No one has talked to you about this case?

A. No, sir, not at all.

Q. You never discussed it with anyone?

A. I have not.

Q. You have no opinion at this time one way or the other?

A. No, sir, I do not have.

Q. You have served on juries before, have you?

A. No, sir, I never have.

Q. This is your first call?

A. That is correct, sir.

Q. I think I asked you—you have a wife and some children?

A. I have one son,—married son.

Q. Yes. You do not know any of these parties?

A. I do not, no ,sir.

Q. Or any of the officers or agents of the Internal Revenue office?

A. Well, not of the Internal Revenue, I do not.

Q. Have you had any tax difficulties with the Federal Government or the State Government at any time?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I know of no reason why I cannot.

To Juror Arthur Paymar:

Q. (By the Court) Mr. Arthur Paymar,—is that the name?

A. Paymar, yes, sir.

Q. Where do you live?

A. 28 Hartford, in this city.

Q. How long have you lived here? A. All my life.

Q. You are married and have a family?

A. Yes, sir, Your Honor.

Q. What is your occupation?

A. I am a canned food buyer for a local chain.

Q. For whom?

A. For a local grocery chain—Klein's Super Markets, to be exact.

Q. The Klein Stores? A. Yes, sir.

Q. You are the purchasing agent for them in certain respects—certain merchandise?

A. Canned goods, yes, sir.

Q. How long have you been with the Klein Company?

A. Eighteen years.

Q. Have you ever had any tax difficulties?
A. No, Your Honor.
Q. With the State or Federal Government?
A. Neither.
Q. Do you know any of these parties?
A. No, I don't, Your Honor.
Q. Have you heard about this case in any way?
A. Just the headlines.
Q. Has anyone ever talked to you about this case?
A. No, Your Honor.
Q. And you do not know any of these parties?
A. No, I don't.
Q. No one has ever told you about this case who claimed to know the facts about it?
A. No, sir.
Q. Have you served on a jury in this court before?
A. No, sir, I haven't.
Q. Have you served in the State Court?
A. No, I haven't.
Q. You do not know any of these parties?
A. No, sir.
Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?
A. No, sir, I do not.
Q. Did I understand that you had lived here all of your life in St. Paul?
A. Yes, sir, practically.
Q. You attended schools in St. Paul?
A. Yes, sir.
Q. And you have been with the Kleins for how many years?
A. Eighteen years.

To Juror Kermit Bailey:

Q. (By the Court) Mr. Bailey, you live in South St. Paul?
A. That is right.

Q. How long have you lived there? A. 32 years.

Q. What is your occupation?

A. I am manager for an appliance store.

Q. For what store? A. An appliance store.

Q. What kind of appliances?

A. Well, Westinghouse Appliances—that is, refrigerators, ranges, and so on.

Q. Electrical equipment? A. That is right.

Q. You are married and have a family?

A. That is right.

Q. How long have you been with this appliance store, in that business?

A. This particular one, four years.

Q. Were you with a similar business before?

A. That is right.

Q. How long?

A. About three years, and then previous to that I was in the service about six years—

Q. About six years? A. Six years, that is right.

Q. You do not know any of these parties? A. I don't.

Q. You have not heard about this case in any way?

A. Outside of what I seen in the newspapers.

Q. From what you read have you any opinion one way or the other at this time?

A. None whatsoever.

Q. You haven't talked to anyone and no one has talked to you about this case?

A. No one has talked to me. I haven't talked to anyone.

Q. I am not sure that I asked you—I may have asked you before today—have you served on a jury in this court?

A. Yes, I have. It was either '46 or '47——I don't remember exactly.

Q. Have you served in the State Court?

A. I don't know whether this would come under the State—it was a local, at South St. Paul, on May 9th, last year.

Q. Probably not. Have you ever served on a criminal case?

A. Yes, I have.

Q. In this court?

A. In this court—that is, Judge Donovan's court.

Q. That was done five or six years ago?

A. That is right.

Q. What is your residence address?

A. 708 Marie Avenue, South St. Paul.

Q. Where is your place of business?

A. 140 North Concord, South St. Paul.

To Juror Lois F. Larsen:

Q. (By the Court) Mrs Lois F. Larsen, you live in St. Paul?

A. Yes, sir.

Q. What is your residence address?

A. 228 North Victoria.

Q. How long have you lived in St. Paul?

A. Oh, I have lived in St. Paul and Minneapolis about 27 years. I lived in Minneapolis a very short time.

Q. You are married and have children?

A. Yes, I have three.

Q. Are you employed or are you in business of any kind?

A. I am employed by the Secretary of State, Motor Vehicle Department.

Q. How long have you been employed by the Secretary of State's office?

A. About sixteen years.

Q. Have you had any tax difficulties with the Federal Government or the State Government?

A. No, sir.

Q. Have you served on juries before? A. No, sir.

Q. Neither in the Federal Court nor the State Court?

A. No, sir.

Q. What is your husband's occupation?

A. He is an executive in the motor vehicle department.

Q. Secretary of State's office?

A. That is right.

Q. How long has he been up there?

A. About 28 years.

Q. Has he had any tax difficulties in any way?

A. None that I know of.

Q. Do you know any of the officers in the Internal Revenue Department?

A. No, I am not acquainted with any of them.

Q. Do you know any of the persons connected with this case?

A. None.

Q. Have you heard about this case in any way?

A. Only the little bit I read in the paper, but I know nothing about it.

Q. Have you any opinion from what you read one way or the other?

A. No, I haven't.

Q. You have not talked to anybody who claimed to know about it?

A. No.

Q. You have not discussed it with anyone?

A. No, I haven't.

Q. How long do I understand that your husband has been in the Secretary of State's office?

A. About 28 years, I think.

Q. What are your husband's initials?

A. Walter E.—Walter E. Larson.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No.

To Juror Bernard V. Minea:

Q. (By the Court) Bernard Minea, you live in St. Paul?

A. 540 Bidwell,—yes, I do, all my life.

Q. And you are with the First National Bank?

A. That is right.

Q. How long have you been down there?

A. Well, indirectly about 39 years—originally with Chattel National. The Merchants took them over and then the Merchants and the First consolidated, so they—

Q. They took you over? A. That is right.

Q. Have you had any tax difficulties with the Federal Government or the State Government at any time?

A. No, I have not.

Q. Do you know any of the persons I mentioned as being officers or agents in the Internal Revenue office?

A. None that you mentioned. I know two or three of them down there but none that you mentioned otherwise.

Q. You mentioned some whom you know?

A. That is right.

Q. But you said that wouldn't influence you?

A. That is right.

Q. Now, I think I talked to you about whether or not you have heard about this case?

A. That is right.

Q. You heard about it over the radio?

A. Not the radio—the newspapers.

Q. The newspapers, and I think you said that would not influence you in this case?

A. That is right.

Q. That you have no opinion one way or the other?

A. That is right.

Q. Have you served on juries in the Federal Court before?

A. Not in the Federal Court.

Q. You have in the State Court?

A. The State Court, over in Ramsey County.

Q. Have you served on criminal juries?

A. Yes, I have.

Q. That was in the State Court?

A. The State Court.

Q. How long ago?

A. Oh, about twenty years ago, I imagine. One thing I might add—what is Mr. Hoffmann's first name. It seems to me that I was on a jury on a case he tried—

Mr. Hoffmann: You were on two juries of mine in the State Court,—one about two years ago.

Q. (By the Court) That was how long ago?

A. I don't know. It must be fifteen years ago.

Q. Do you know Mr. Hoffmann personally?

A. Nothing other than just being on the case one time where he was the plaintiff, I believe, and the other time he was the attorney in the case, if I recall correctly.

Q. Well, the information obtained at that time would not influence you in this case?

A. Not a bit,—not a bit.

Q. You really, as I understand you then, do not have a speaking acquaintanceship with Mr. Hoffmann?

A. No, I do not.

Q. He has never represented you in any legal matters.?

A. No, he didn't.

Q. Do you know any of the other lawyers in this case?

A. Not as a speaking acquaintance, I don't believe, no.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I do not.

To Juror George B. Muellner:

Q. (By the Court) Mr. George B. Muellner—

A. Here.

Q. What is your residence address?

A. 1278 Niles, St. Paul.

Q. How long have you lived in St. Paul?

A. All my life.

Q. You are married?

A. Yes.

Q. Do you have any children? A. Yes.

Q. How many? A. Two.

Q. What is your occupation?

A. I am working for the Skelly Oil Company.

Q. How long have you been with the Skelly Oil Company?

A. Going on 23 years.

Q. What is the nature of your work?

A. Well, it is mostly taking care of shipping and seeing that trucks are loaded, checking drivers, and stuff like that.

Q. You in a measure oversee the work of the company then?

A. Yes.

Q. See that it is carried on?

A. Yes.

Q. And that the work is done. How long have you been with the company?

A. Going on 23 years.

Q. Have you had any tax difficuties at any time in the past?

A. No.

Q. With the State or the Federal Government?

A. No, Your Honor.

Q. Have you heard about this case in any way?

A. No, just what I heard on the radio.

Q. Would that influence you one way or the other in this case?

A. No, it would not.

Q. You have no opinion at this time as to whether this defendant is guilty or innocent?

A. No, I have not.

Q. You have not talked to anybody about this case?

A. I have not.

Q. No one has talked to you or told you about it who claimed to know about it?

A. No, they haven't.

Q. Have you ever served on a jury in this court?

A. No, I haven't Your Honor. This is the first time I ever served on any jury.

Q. You have not heard about this case in any way except in the headlines or on the radio?

A. That is right.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I don't.

BLEED THROUGH

To Juror H. V. E. Johnson:

Q. (By the Court) H. V. E. Johnson, you live at Cannon Falls?

A. Yes, sir.

Q. In the town of Cannon Falls? A. No, I don't.

Q. How far do you live from Cannon Falls?

A. Eight miles.

Q. Which direction? A. East.

Q. Do you live on a farm? A. Yes, sir.

Q. Farming is your business? A. Yes, sir.

Q. That is your business exclusively? A. Yes, sir.

Q. How long have you lived where you now live?

A. 35 or 40 years.

Q. All of your active life, anyway? A. That is right.

Q. Have you had any tax difficulties with the State or the Federal Government at any time?

A. No, sir.

Q. Have you heard about this case in any way?

A. No, sir.

Q. Do you know any of these gentlemen who are interested in this case?

A. No, sir.

Q. You have not talked to anyone about it? A. No, sir.

Q. No one who claimed to know the facts has told you about it?

A. No, sir.

Q. You have served on juries before? A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, I do not.

Q. You have been a farmer all of your life, have you?

A. Yes, sir.

Q. And you have lived practically all your life where you now live?

A. Yes, sir.

POOR COPY

To Juror Leon Hayward:

Q. (By the Court) Mr. Leon Hayward, you live in Pine Island?

A. Yes, sir.

Q. How far is Pine Island from Cannon Falls?

A. About 35 miles, I guess.

Q. You are married and have a family?

A. Married—I have no family.

Q. What is your occupation? A. Retired farmer.

Q. You lived on a farm most of your life?

A. All my life. Three years ago I moved to town.

Q. Until how long ago? A. Three years ago.

Q. What business did you go into then?

A. Kind of retired and looked after the farm.

Q. You retired from the farm and have not re-entered business, is that it?

A. That is true.

Q. Have you had any tax difficulties with the Federal or the State Government at any time?

A. No.

Q. Have you heard about this case in any way?

A. No, just mentioned—I remember seeing the headlines in the paper is all.

Q. You may have read about it at that time, did you?

A. I don't believe I even read about it, Your Honor. I don't remember anything about it, anyway.

Q. Well, did you form any opinion one way or the other at that time, or at any time since?

A. No.

Q. Has anyone talked to you about this case? A. No.

Q. You have no opinion at this time? A. No, sir.

Q. One way or the other? A. No, sir.

Q. Have you served on a jury in this court before?

A. I never served on any jury.

Q. This is your first jury experience? A. Yes, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir.

To Juror Leonard O. Neilson:

Q. (By the Court) Mr. Leonard O. Neilson, you live in St. Paul?

A. Yes, Your Honor.

Q. How long have you lived here?

A. About twenty years.

Q. What is your occupation?

A. I work for the Government—

Q. Oh, yes. A. In the Postal Department.

Q. Yes. How long have you been in that department?

A. I have just been there about seven months.

Q. Have you heard about this case in any way?

A. Yes, Your Honor, I have.

Q. Have you read about it in the newspapers?

A. Yes, Your Honor.

Q. Did you form an opinion one way or the other from what you heard or read?

A. No, I didn't form an opinion.

Q. Has anyone talked to you about this case? A. No.

Q. You have not discussed it with anyone?

A. No, I haven't.

Q. Have you ever served on a jury in this court?

A. Yes, Your Honor—not in this court but the State Court.

Q. The State Court? A. Yes, Your Honor.

Q. You are married and have a family?

A. I have four children.

Q. Would the fact that you are employed by the Postal Department of the Government and the Government is prosecuting this case influence you in any way?

A. I don't think it would.

Q. How? A. No, I don't think it would.

Q. Well, you know better than anyone else. You feel that you can hear the evidence in this case, the instructions of the Court, and join in a fair and impartial verdict in this case irrespective of the fact that you are employed in the Postal Department?

A. Yes, Your Honor.

Q. How long have you been with the Postal Department, do I understand?

A. About seven months.

Q. Before that what was your occupation?

A. I was an interior decorator.

Q. How long were you an interior decorator?

A. About seven years, or since I came back from overseas.

Q. Were you in the Second World War?

A. Yes, Your Honor.

Q. How long?

A. I was overseas about a year,—South Pacific.

Q. About a year? A. Yes, Your Honor.

Q. Were you abroad? A. Yes, I was over in Manila.

Q. Then you came back to this country—

A. (Interposing) That is right.

Q. And you were a painter and an interior decorator for four or five years?

A. Yes, sir, four or five years.

Q. And since that time you have been employed in the Postal Department?

A. For the last seven months I have been in the Post Office.

Q. The last seven months. Now, you feel you can serve on this jury and join in a fair verdict in this case, notwithstanding the fact that you are employed in the Postal Department?

A. That is right.

Q. What is the work that you now do in the Postal Department?

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A. I am sort of a utility man. I work on the "down", and I work on the "loading belt", and I sort mail, parcel post—

Q. Is your work at the new building or around this building?

A. At the main Post Office.

Q. Now, you have not talked to anybody about this case?

A. No.

Q. No one has talked to you about it? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I do not.

To Juror May R. Ganfield:

Q. (By the Court) Mrs. May R. Ganfield? A. Yes.

Q. You live at Hastings? A. Yes, sir.

Q. How long have you lived there? A. 23 years.

Q. Are you employed or are you in business on your own account?

A. I am not.

Q. You keep the home?

A. I do.

Q. What is your husband's occupation?

A. My husband is an attorney.

Q. How long has he been practicing?

A. Since 1925, with the exception of three years when he was not practicing.

Q. Where is his office? A. In Hastings.

Q. Have you ever served in his office as a secretary?

A. No, not at all.

Q. Your work in the home is entirely separate from his work in the office, is that correct?

A. Entirely.

Q. How many children have you? A. Three sons.

Q. Do you know anyone connected with this case?

A. I do not.

Q. You do not know any of these lawyers?

POOR COPY

A. Not personally. The names of some are familiar, but not personally.

Q. You are not personally acquainted with any of them?

A. I am not.

Q. You do not know the defendant? A. I do not.

Q. Have you heard about this case in any way?

A. I have read of it in the newspapers.

Q. Did you form an opinion one way or the other when you read about it?

A. No, sir.

Q. You have no opinion at this time? A. No.

Q. One way or the other— A. No.

Q. No one who claimed to know about this case has ever talked to you about it?

A. No, sir.

Q. You have never discussed it or expressed an opinion about it one way or the other yourself? A. No.

Q. Have you ever served on a jury before?

A. No, I haven't.

Q. In the Federal Court or the State Court either?

A. No.

Q. Have you ever had any tax difficulties, or has your husband, to your knowledge, with the State or Federal Government?

A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I do not.

To Juror Lester J. Gilbert:

Q. (By the Court) Mr. Lester J. Gilbert, you live in St. Paul?

A. Yes, sir.

Q. How long have you lived here? A. All my life.

Q. What is your occupation?

A. I am the resident manager for the C. Reiss Coal Company in St. Paul.

Q. How long have you been with that company?

A. 27 years.

Q. You are married and have a family? A. Yes, sir.

Q. What is your residence address?

A. 515 South Saratoga.

Q. What is the nature of the work for your company?

A. Retail and wholesale selling of fuel.

Q. You are in charge of the sales—

A. (Interposing) Of the St. Paul office, yes, sir.

Q. Have you heard about this case?

A. I saw an article in the newspaper, yes, sir.

Q. Do you know any of the lawyers,—any of the persons connected with the case?

A. No, sir, I do not.

Q. From what you read have you formed any opinion one way or the other?

A. No, sir.

Q. You have no opinion at this time? A. I do not.

Q. Have you served on juries before?

A. In the Ramsey County District Court, I believe, twice.

Q. State Court? A. Yes, sir.

Q. But not in this court? A. No, sir.

Q. How long ago is it since you served in the Ramsey County District Court?

A. Oh, that is twelve or thirteen years ago, I believe.

Q. A good many years ago? A. Yes, sir.

Q. Have you had any tax difficulties with the State or Federal Government?

A. Other than paying them, no, sir.

Q. We have to do that whether we want to or not. You have had that same experience?

A. Yes, sir.

Q. That wouldn't influence you in this case?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I do not.

To Juror Milton W. Baumann:

Q. (By the Court) Milton W. Baumann, you live in South St. Paul?

A. That is right.

Q. How long have you lived there? A. Five years.

Q. Before that where did you live?

A. Newport, right across the river from South St. Paul.

Q. How long had you lived over at Newport?

A. Three years.

Q. You are married? A. That is right.

Q. Do you have a family? A. Yes.

Q. How many children? A. Five.

Q. What is your occupation?

A. I am with Griggs, Cooper & Company as a machine operator at the present time.

A. I am sorry?

A. I am with Griggs, Cooper & Company as a machine operator at the present time.

Q. How long have you been with Griggs, Cooper?

A. One year.

Q. What sort of a machine do you operate?

A. Quite a few of them—most any of them over there—candying machines or folding machines.

Q. I see. Before you went with Griggs, Cooper, what was your occupation?

A. Production man with the Raymond Laboratories.

Q. How long had you been with Raymond Laboratories?

A. Five years.

Q. What was your work there?

A. Well, overseeing all production in the plant.

Q. Before that what was your occupation?

A. With the Direct Oil Service Corporation of Minneapolis,—in the office over there.

Q. How long were you in their office? A. Ten years.

Q. Have you ever served on a jury before?

A. County District jury.

Q. Not in this court? A. Not in this court, no.

Q. Have you heard about this case in any way?

A. Oh, I saw an article in the paper one time. I don't know how long ago it was—

Q. Did you form any opinion one way or the other from what you read about it?

A. I didn't read it because I didn't know the parties involved.

Q. Do you know any of the parties connected with this case?

A. No, I do not.

Q. Has anyone who claimed to know anything about the facts talked to you about this case?

A. No, they haven't.

Q. You have not discussed it with anyone yourself?

A. No.

Q. Or formed any opinion one way or the other? A. No.

Q. Have you ever had any tax difficulty with the State or Federal Governments?

A. Oh, I have been called in to re-check them,—gone over a little bit and settled.

Q. Reported a little further? A. That is right.

Q. And took your medicine like the others?

A. That is right.

Q. Would that influence you in this case? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. I know of no reason at all.

To Juror Lloyd A. Davis:

Q. (By the Court) Lloyd A. Davis, what is your address?

A. 1533 South Concord, South St. Paul.

Q. How long have you lived in St. Paul?

POOR COPY

A. About eight years and a half.

Q. Before that where did you live?

A. Northfield, Minnesota.

Q. How long had you lived down there?

A. About eight or ten years, I guess.

Q. What is your occupation?

A. Ticket writer for the St. Paul Union Stockyards Company.

Q. I didn't get the nature of your work from that answer—

A. Ticket writer.

Q. Ticket writer for the St. Paul Union Stockyards Company?

A. Yes, sir.

Q. How long have you been with the St. Paul Union Stockyards?

A. Six years.

Q. Before that what was your work?

A. I worked for the Sun Commission Company for two years and a half.

Q. Have you heard about this case in any way?

A. No, I haven't.

Q. Do you know any of these parties? A. No, sir.

Q. Do you know any of the officers or employees of the Internal Revenue Department who have been mentioned in this case?

A. No, I don't.

Q. You do not know any of these lawyers? A. No, sir.

Q. Have you heard about this case in any way?

A. Oh, I heard it on the radio but didn't pay much attention to it.

Q. Did you form any opinion one way or the other from what you heard?

A. No, sir.

Q. Has anyone who claimed to know the facts talked to you about this case?

A. No, sir.

Q. Have you ever discussed it with anyone,—formed an opinion of any kind about the case?

A. No, sir.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir.

To Juror Adrian G. Carlson:

Q. (By the Court) Mr. Adrian G. Carlson, what is your residence address?

A. 778 Holly Avenue.

Q. Here at St. Paul? A. St. Paul, yes.

Q. How long have you lived here?

A. I have lived here all my life.

Q. What is your occupation?

A. I am a teller at the Empire National Bank.

Q. How long have you been with the Empire National?

A. About twelve years.

Q. Before that what was your work?

A. Oh, I was in a small grocery business for three or four years.

Q. You are married and have a family?

A. No, I am single.

Q. You are a single man? A. Yes, sir.

Q. Have you had any difficulty with tax matters, state or federal, at any time in the past?

A. No.

Q. Do you know anyone connected with this case?

A. No, I do not.

Q. You have not heard about it in any way?

A. I have read about it in the papers.

Q. Did you form any opinion from what you read one way or the other?

A. No, I have not.

Q. You have no opinion at this time one way or the other?

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A. No, sir.

Q. Have you ever served on a jury before?

A. I have on the State juries, yes.

Q. But not in this court? A. Not in this court.

Q. How long ago is it since you served on a State, jury?

A. Oh, I get called almost every year, it seems. I was on about fifteen months ago.

Q. In the State Court? A. On a State jury.

Q. Have you served on any criminal cases?

A. No, I have not. That was all civil.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict in this case?

A. No, sir, I do not.

To Juror Theodore H. Palmer:

Q. (By the Court.) Mr. Palmer, you live in St. Paul?

A. Yes, sir.

Q. What is your residence address?

A. 1879 Highland Parkway.

Q. How long have you lived in St. Paul?

A. About twenty years.

Q. What is your occupation?

A. I am manager, and a partner, the Fire Brick Supply Company.

Q. How long have you been in that business?

A. Eight years with that company.

Q. What other company?

A. It is about eight years since we formed that company but I have been in an allied field for some 22 years.

Q. All your active life, then?

A. Yes, sir.

Q. What is your work with your company now?

A. Managing.

Q. You are the manager of the business?

A. That is right.

Q. Have you had any tax difficulties with the State or Federal Government at any time?

A. I have had a minor problem with the Federal, but nothing serious, auditing—a couple of audits, tax deductions.

Q. It was adjustable and was adjusted then?

A. Adjusted.

Q. The difficulties were ironed out?

A. Oh, yes,—usually have to end up paying.

Q. You have not talked to anybody about this case?

A. No, other than around the office.

Q. No one who claimed to know the facts about the case has talked to you about it?

A. No.

Q. And you have not heard anything that has caused you to form an opinion one way or the other?

A. No, sir.

Q. You are married? A. Yes, sir.

Q. Do you have any children? A. Four.

Q. You have been in your present business about eight years, did I understand?

A. With this company, yes.

The Court: Is there anything further, gentlemen?

Mr. Landrum: The Government has nothing, Your Honor.

The Court: The defense?

(Question submitted to the Court by Mr. Graff.)

The Court: Which juror is employed by the Post Office?

Juror Neilson: Right here.

To Juror Leonard O. Neilson:

Q. (By the Court.) Your name and your residence address?

A. My name is Loenard O. Neilson. I live at 1142 Marshall Avenue, St. Paul.

Q. How long have you lived there?

A. I have lived there around about twelve years.

Q. I am not sure that I got that street address—

A. 1142 Marshall Avenue.

Q. And your name was— A. Neilson.

Q. Neilson, yes.

The Court: Mrs. Ganfield, you live at Hastings?

Juror Ganfield: Yes, sir.

The Court: Mr. Gilbert, you live in St. Paul?

Juror Gilbert: Yes, sir.

The Court: Mr. Baumann, what is your street address?

Juror Baumann: 1228 Fifth Avenue South.

(Note submitted to the Court by Mr. Graff.)

The Court: Mr. Rea, you have served on the Grand Jury five or six years ago, as I remember?

Juror Rea: Yes, sir.

The Court: Were any of these lawyers concerned with any of the business that was before the Grand Jury at that time?

Juror Rea: I believe the gentleman on the far right was there once. I am almost positive.

The Court: Mr. Landrum, will you stand up?

(Mr. Landrum arose.)

Juror Rea: No, the gentleman in the glasses. I don't recall the name—

(Mr. Graff arose.)

Juror Rea: That is the gentleman there. He didn't

wear glasses then, I don't believe. I didn't recognize him with the glasses on.

The Court: Well, he is getting a little older all the time.

Juror Rea: That is right.

The Court: You remember him, do you?

Juror Rea: I remember him, yes, sir.

The Court: You remember of him being before the Grand Jury?

Juror Rea: That is right.

The Court: Presenting matters at that time?

Juror Rea: That is right.

The Court: Now, Mr. Gutsche, do you remember any of these lawyers?

Juror Gutsche: If that is the case, I remember him, too, because we were together.

The Court: Do you remember him? Do you remember that he was before the Grand Jury?

Juror Gutsche: I believe he was.

The Court: You remember that also?

Juror Gutsche: Yes.

(Jury list handed to counsel by the Clerk.)

Mr. Graff: If the Court please, I wonder if I may suggest a recess at this point?

The Court: Yes, only I want to select this jury this afternoon and the alternates.

Court will recess for ten minutes.

(Whereupon, at 4:00 o'clock P. M. a brief recess was taken.)

The Court: You may proceed with the selection of the jury.

(Counsel for the Government and the defendant exercised their jury strikes at this point.)

The Clerk: Will the following jurors please answer as their names are called: Mrs. Alice F. Pfeiffer, Gustav A. Peterson, Leo Leonard Ament, Willard W. Baker, Erick R. Kempe, Arthur Paymar, George B. Muellner, H. V. E. Johnson, Milton W. Baumann, Lloyd A. Davis, and Adrain G. Carlson.

Will all the jurors whose names were not called please step down from the jury box and all jurors whose names I called take seats in the jury box.

The Court: Poll the jury, Mr. Clerk.

(The jury was polled.)

The Court: Swear the jury, Mr. Clerk.

(The jury of twelve was duly sworn by the Clerk.)

The Court: You may call the jurors for two alternates, Mr. Clerk. As your names are called, please make answer, come forward and have chairs in this front row.

(Four additional jurors were thereupon called and duly sworn by the Clerk.)

The Court: The gentlemen, those of you who have just been called, are for the purpose of securing two alternates. Sometimes jurors become ill, sometimes members of the immediate family of jurors become ill, or there may be some sort of an emergency that makes it at least difficult for them to continue jury service, and courts have found that it is proper where a case may last a rather unusual length of time to impanel alternates. We will impanel two in this case. That will give each side a challenge where four are

called and the two that are selected will sit in this case, and should any juror for any reason become unable to serve or disqualified from serving, an alternate may be chosen to serve in his place. So that is the purpose for which you are now called.

Is there any one of the four of you who didn't hear my brief remarks of what this case is about? If so, raise your hand.

(No response.)

Do any one of the four of you know anyone connected with this case—the lawyers, or the defendant, or the officers and employees of the Internal Revenue Department, or anyone connected with the case?

(No response.)

To Juror Chester G. Engstrom:

Q. (By the Court.) Mr. Engstrom, I wish you would stand, please. I can't very well see you.
A. (Juror stands.)
Q. You live in St. Paul? A. Yes, sir.
Q. How long have you lived here? A. Since 1936.
Q. What is your residence address? A. 985 West Iowa.
Q. How long have you lived there?
A. I have lived there five years.
Q. You are married? A. I am married,—no children.
Q. What is your occupation?
A. I am an accountant for the State of Minnesota.
Q. What department of the State?
A. The Division of Social Welfare.
Q. How long have you been with that department?
A. Since 1941.
Q. Was that your first service for the State?
A. That was my first service for the State.
Q. I see. It is office work that you do?

A. Office work, that is right, sir.

Q. You have had no difficulty with the State or Federal Government in tax matters?

A. None whatever, sir.

Q. You make your return, pay your taxes, and that ends the matter, so far as you are concerned?

A. That is right.

Q. Do you know this defendant?

A. No, sir.

Q. Have you heard about this case in any way?

A. Just what I have read in the paper.

Q. Did you form an opinion from what you read in the newspapers about the case, that is, one way or the other?

A. No, I haven't.

Q. You have no opinion at this time?

A. None whatever.

Q. (Continuing.) As to whether this defendant is guilty or not guilty?

A. No, sir.

Q. You have not heard about it on the radio?

A. No—I don't recall hearing. If I have, I haven't taken any notice of it whatever.

Q. You have not talked to anyone who claimed to know the facts in connection with the case?

A. No.

Q. You have not discussed the case with anyone at any time?

A. Not anyone.

Q. I believe I asked you—you do not know this defendant?

A. Yes—I do not know the defendant.

Q. Have you ever served on a jury before?

A. It was for the Municipal Court, I believe, in some civil cases.

Q. You have not served in this court before?

A. Never in this court, no, sir.

Q. You have never served on a grand jury?

A. Never on a grand jury.

Q. In the State Court or the Federal Court?

A. No, I have not.

Q. Do you know any reason why you can't serve as an alternate or as a juror in this case and join in a fair and impartial verdict if you are called upon to do so?

A. No, I do not.

Q. How long have you lived in St. Paul?

A. Since 1936.

Q. Where did you live before that?

A. Well, I was going to school in Minneapolis for four years and prior to that I lived in Two Harbors.

Q. Two Harbors in this state?

A. In this state, that is right, sir.

The Court: You may be seated.

To Juror Roy G. Hoge:

Q. (By the Court.) Mr. Hoge, you live in St. Paul?

A. Yes.

Q. How long have you lived here?

A. 24 years.

Q. What is your residence address?

A. 2889 North, Highway 61.

Q. You are married and have a family?

A. Yes,—one boy.

Q. What is your occupation?

A. A well drilling contractor.

Q. I beg your pardon?

A. Water well drilling contractor.

Q. How long have you been engaged in that business?

A. Oh, it is about 25 years—all my life, practically.

Q. In St. Paul and the surrounding country?

A. St. Paul and surrounding country.

Q. Have you ever had any tax difficulties with the State or Federal Government?

A. No.

Q. Have you read or heard about this case in any way?

A. No, I haven't.

Q. No one who claimed to know the facts has ever talked to you about it?

A. No.

Q. You have never discussed it with anyone?

A. No, sir.

Q. Have you served on juries before? A. No, sir.

Q. This is your first jury service? A. That is right.

Q. Do you know the parties connected with this case—I mean the lawyers or the defendant?

A. No, sir.

Q. You are not acquainted with any of them? A. No.

Q. You have not heard about this case in any way?

A. No, sir.

Q. Did you ever serve on a grand jury? A. No.

Q. Do you know of any reason why you can't serve on this jury and join in a fair verdict if called upon to serve as a juror?

A. No.

Q. Do you know any of the agents of the Internal Revenue Department here in St. Paul?

A. Not personally, no.

The Court: You may be seated.

To Juror Robert G. Larson:

Q. (By the Court.) Mr. Robert G. Larson, you live in South St. Paul?

A. Yes, sir.

Q. How long have you lived there?

A. Three and a half years.

Q. Before that where did you live?

A. St. Paul, practically all my life.

Q. What is your residence address now?

A. 352 Park Lane.

Q. You are married and have a family?

A. Yes, sir,—two children, both grown.

Q. Have you had any tax difficulties with the State or Federal Government at any time in the past?

A. Well, I lived in New Jersey in about 1937 and I guess my tax return didn't get into the Federal Government fast enough to suit them or something, so they came and looked me up; they found me all right—I was here.

Q. And you made a return, did you?

A. Pardon?

Q. You made a return then, did you?

A. Yes, I turned it in in Newark, but in the meantime I moved back to St. Paul. That's the only trouble I ever had.

Q. You had lived here and moved away and then came back again?

A. Moved back again, that is right.

Q. That was the only difficulty you have had?

A. That is right.

Q. You got that straightened out all right, I suppose?

A. Yes, sir.

Q. Do you know any of the officers or agents of the Internal Revenue office here?

A. No, I don't.

Q. Do you know any of these lawyers?

A. No, sir.

Q. Do you know the defendant in this case?

A. No, I don't.

Q. Have you heard about this case in any way?

A. Well, I have read the headlines, you might say. I haven't even taken an interest enough in it to read the article.

Q. Well, from what you read or heard about it, have you formed any opinion one way or the other?

A. No, sir.

Q. You have no opinion at this time?

A. Not at this time.

Q. No one who claimed to know the facts has talked to you about it at any time?

A. No, no one has discussed it with me.

Q. You have served on juries before?

A. No, sir, I have not.

Q. You have never served on a grand jury?

A. On no jury, State or Federal.

Q. Do you know anyone connected with the Bureau of Internal Revenue?

A. No, sir. The only person I know in this court room—I don't know if he is here or not—"Dutch" McGowan.

Q. Mr. McGowan, the United States Marshal?

A. That is right.

Q. How long have you known him?

A. Well, we were in the Army together, in the "Big War".

Q. The First War? A. That is right.

Q. Would that influence you in this case? A. No, sir.

Q. He wouldn't want it too, I am sure of that. You do not know anyone connected with the Internal Revenue office?

A. I do not.

Q. You got your difficulties straightened out and now you don't know—

A. I don't even remember the name of the party that looked me up, but it was 1937, so I would have to remember it pretty well—fifteen years.

Q. What is your occupation?

A. I am a department head for Swift & Company.

Q. How long have you been with Swift & Company?

A. Thirty years.

Q. What department are you in?

A. I really have two—Table Ready Meats and Canned Foods.

Q. And you have been with Swift & Company for thirty years, did I understand?

A. Yes, sir.

Q. You have served them away from here and you have served them here?

A. That is right.

Q. I think I asked you—you have a family?

A. I do.

Q. And children—they are adults?

A. They are adults. The "baby" is 25 this week.

Q. Is your work in South St. Paul at the Swift plant?

A. That is right.

Q. And you returned back here from New Jersey to serve in the plant here?

A. That is right,—came back in 1938.

Q. Now, you haven't heard about this case in any way?

A. Pardon?

Q. You haven't heard about this case except what you have read in the newspapers?

A. I have noticed in the papers but haven't taken any interest in it.

Q. You have not formed an opinion one way or the other?

A. I haven't read the article even.

Q. Yes. Do you know of any reason why you can't serve as an alternate or as a juror if called upon to do so in this case and join in a fair verdict in this case?

A. Not that I know of.

Q. Well, you ought to know if anybody would.

A. Yes.

To Juror Frank P. Paddock:

Q. (By the Court.) Now, Mr. Frank P. Paddock, you live in St. Paul?

A. Yes, sir.

Q. What is your residence address? A. 1302 Forest.

Q. How long have you lived in St. Paul? A. All my life.

Q. You are married. A. Yes, sir.

Q. Do you have any children?

A. Yes,—a boy 21 and a daughter 15.

Q. What is your occupation?

A. Superintendent of the rubber adhesives, Minnesota Mining.

Q. How long have you been with Minnesota Mining?

A. About 24 years.

Q. Now, just what is your work?

A. Oh,—I have charge of the manufacturing of adhesives.

Q. That is Sctoch tape?

A. Scotch tape.

Q. And you have charge of the manufacturing work of that product?

A. Yes, sir.

Q. You have been there for 24 years?

A. 24 years last April.

Q. Have you had any tax difficulties with the United States?

A. No, sir.

Q. Or with the State of Minnesota? A. No, sir.

Q. Have you ever served on juries before?

A. No, this is the first time.

Q. You have never served on a grand jury? A. No, sir.

Q. You do not know any of these parties? A. No, sir.

Q. You do not know the defendant? A. No, sir.

Q. You have not heard about this case?

A. Very little—the headlines in the paper is about all. I didn't follow through on it or anything.

Q. You have read some of the newspaper accounts of it?

A. Very little.

Q. Did you form any opinion one way or the other from what you read?

A. No, your Honor.

Q. Has anyone who claimed to know the facts talked to you about the case?

A. No, sir.

Q. Have you discussed it with anyone? A. No, sir.

Q. You have no opinion one way or the other at this time?

A. No, sir.

Q. Do you know of any reason why you can't serve as an alternate in this case or as a juror if you were called upon to do so and join in a fair and impartial verdict in this case?

A. No, sir, I see no reason why I couldn't.

Q. What newspapers do you read?

A. The Press and Dispatch.

Q. The St. Paul papers? A. Yes, sir.

Q. You do not read the Minneapolis papers?

A. Sunday paper.

Q. The Sunday Minneapolis paper?

A. Yes.

(Question handed to the Court by Mr. Graff.)

The Court: Let me ask the four of you—I think I have already asked some of you: Do you know anyone connected with the Internal Revenue Office here in St. Paul? If so, raise your hand.

(No response.)

Are any of you acquainted with anyone connected with the United States Attorney's office in St. Paul?

If so, raise your hand.

(No response.)

Have any of the attorneys of that office ever represented you in any legal matters?

(No response.)

I will ask the four of you—first I will make this statement to you, that this defendant is presumed to be innocent and that presumption remains with him throughout the trial of this case and until the Government has proved him guilty beyond a reasonable doubt. Is there any one of the four of you who for any reason could not give the defendant the

benefit of the presumption of innocence? If so, raise your hand.

(No response.)

On the other hand, there are perhaps some citizens, some people, who feel that they could not under any circumstances join in a verdict of guilt against anyone. That is the other extreme from the one I have mentioned. Do any one of you have that sort of a feeling, that is, irrespective of the facts or instructions of the Court, you just could not convict your fellow man? If you feel that way, inform the Court, because that would be, as I say, the other extreme. It would be improper; you would not be able to qualify as a juror in any sort of a criminal prosecution.

(No response.)

I believe that is all.

(Further challenges exercised by counsel for the Government and for the defendant.)

The Court: Mr. Engstrom and Mr. Hoge, will you step to the back of the court room. Mr. Larson and Mr. Paddock, you will stand and raise your right hand.

(The jurors Larson and Paddock were duly sworn by the Clerk.)

The Court: The alternates will sit with the jury throughout the trial of this case and will serve as jurors if you are for some reason called upon to do so at any time in the progress of the trial. It will be the privilege of the Court to ask you, or one or the other of you, to serve as a juror in the trial of this case. That will not become necessary, of course, if these jurors are not disqualified or unable for some reason from serving as jurors. Twelve constitute a jury. You constitute the alternates, and you may be called upon to serve in place of one or two of these jurors.

(To the entire jury.) Members of the jury, the United States Marshal has made arrangements for your accommodations at the Lowry Hotel. You will be provided rooms, food and such accommodations as may be necessary for your comfort and for your benefit while you are serving as jurors in this case. The Marshal or his agents will be on hand and you may inform whoever is there of such desires as you may have. There will be a telephone in the Marshal's quarters and you can use that telephone under certain conditions, of which the Marshal will advise you.

There will be a lady in attendance who will take care of the wants of the lady who has been impaneled as a juror in this case.

This precaution is not always taken. It often is taken in cases that the Court considers of sufficient importance or sufficient extent as to justify the action. It is as much for the protection of the members of the jury as for any other reason. It is barely possible that some embarrassing matter may develop in the trial of a case that would be embarrassing to you. The Court desires to throw every influence and protection possible around juries that are engaged in the trial of important cases. Consequently, this provision has been made for your comfort and your welfare. If you are not satisfied with everything that is provided, tell the Marshal and tell him to inform me.

Now, you have been impaneled and sworn to try this case and to render a fair and impartial verdict, according to the evidence and according to the law. That is your greatest duty now as a citizen. Do not permit anyone to communicate with you about this case wherever you may be, whether it be in the hotel, on the street, in this building, or any place that you might happen to be. You must guard against anyone communicating with you about this case. Should anyone undertake to do so, inform whoever it may be that you are

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on this jury and that they must refrain from communicating with you. Should they persist, you may inform the Court.

Now, undertake to keep your minds free from a conclusion as to what the verdict in this case should be until you have heard all the evidence, the arguments of counsel, and the instructions of the Court. The case will then be submitted to you for your collaboration, for your study of the evidence together, and for your conclusion as to what the verdict should be. This case is to be decided on the evidence that is heard here during the trial and not upon anything that might occur elsewhere.

I think I said this morning—anyway, I have often said that people frequently make remarks about a case that is on trial. I think it is usually thoughtless remarks, but such remarks might possibly be far-reaching, although the speaker might have absolutely no facts upon which to base his statement or conclusion, so that is the reason why we want to hear the sworn testimony and that is the basis for your verdict in this case. Do not forget it.

The alternates will be accommodated along with the jurors in this case. Your hours will be the same as the hours of these jurors. You will serve with them wherever they are and in this court room until the end of this trial. If all the members are still on the jury, not disqualified for any reason,—if there has been no emergency that has caused them to be excused from this jury, you will then be excused and the case will be submitted to the jury and they will return a verdict. Otherwise you will be called upon, if it is necessary, to serve on the jury and join the jury in reaching a verdict in this case.

I believe there is nothing more at this time?

(No response.)

It is slightly after 5 o'clock. Your hours during this

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trial will be from 10 to 12:30 and from 12:30 until 2:06 o'clock you will have a luncheon period. You will then serve from 2:00 until 5:00 o'clock unless the Court recesses at an earlier hour. That may be done at times.

The deputies and bailiffs in charge of the jury may come forward and take the oath.

(The deputies were duly sworn by the Clerk.)

The Court: You will now, members of the jury and the alternates, retire to the St. Paul Hotel. The officers will come forward. You may retire at this time. The audience will keep their seats, please.

Juror Alice F. Pfeiffer: Your Honor, may I speak to you afterward, or must I speak to you now?

The Court: (To the deputy.) You may see that the lady has an opportunity to speak to the Court. The gentlemen on the jury may proceed with the officer in charge.

(Discussion off the record.)

Mr. Graff: May the record show that Juror No. 1 has been excused with the consent of counsel on both sides and in her place and in her stead the first alternate juror will serve as a regular juror. On behalf of the defendant, we are agreeable to such procedure.

Mr. Landrum: It is satisfactory to the Government.

The Court: Very well. Then Robert G. Larson, the first alternate, will be asked to serve as a juror.

Mrs. Pfeiffer, in view of the fact that you are greatly needed at home by your family, counsel have agreed that the Court might excuse you from serving on this jury and that alternate No. 1 may be called to serve in your stead. That is the purpose of having alternates; you see the effect of it now. So you are excused and you may go home.

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Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 20, 1952. Appearances are as has been heretofore noted.

The Court: Mr. Clerk, let me have the jury list, please.

(Document handed to the Court.)

The Court: Mr. Robert G. Larson, South St. Paul, will occupy a position—

Mr. Landrum: Just a moment, if the Court please. Could I approach the Bench?

The Court: Yes. Mr. Graff, you will come forward also.

(Discussion between Court and counsel at Bench off the record.)

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Graff: At this time the defendant wishes to take exception to the action of counsel for the Government in handing some communications to the Court which apparently were written by one of the jurors on this panel, of which the defense has absolutely no information. We submit that it is highly irregular, and may the record show that the Court is examining the material submitted by counsel for the Government.

Mr. Landrum: Counsel for the Government this morning has called the Court's attention to the fact that the juror, M. W. Bauman, according to the records of the Collector of Internal Revenue in and for the District of Minnesota has not paid any income tax for the year 1948. That the amount of tax was $4,583.90. The penalty thereon, $1,145.88, with interest figured to the 15th day of November, 1950, is $458.38. That he has been called upon to make such settlement with the Government. That in pursuance thereof he has filed papers but that there has been no settlement. That he fur-

ther in his income tax return for 1949 owes a tax of $2,966.52 from which there is a credit of $1,000.00 leaving a balance of $1,966.62. That he has made no income tax return whatsoever for the year 1950. That he is familiar with these matters and has been on numerous occasions in conference with officials of the Department of Internal Revenue with relation thereto. That there have been tax liens filed against him of which he has knowledge, and that he has sold his home against which there is such a tax lien.

Mr. Graff: If the Court please, in view of the statement of counsel that has been read into the record, it is very apparent to me that there has been an investigation made by the Government of these particular jurors that are on this jury panel, and at this time we move the Court to declare a mistrial.

The Court: This is old data obtained by the Government in regard to this one party, as I understand the situation.

Mr. Graff: Well, Your Honor, how could they know that this would exist unless they had made a search as to everyone there?

Mr. Landrum: If the Court please, let the record show that the facts of the matter are that counsel for the Government had no information whatsoever with relation to this matter until this morning when the names of the jurors had been published in the Press and our attention was then immediately called to it by the Chief of the Intelligence Unit of the Internal Revenue Department in the City of St. Paul. It did not come to our attention until at least 8 o'clock this morning.

Mr. Graff: If the Court please, I do not accept that statement of fact. If counsel wishes to prove that, as a matter of fact, there are ways and means of proving it. I do not accept the statement. I think that this is evidence of the fact that there has been an investigation made and we take ex-

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ception to it. We think it is highly improper and irregular and we ask the Court, request the Court to declare a mistrial of this case.

The Court: The motion for a mistrial is overruled. Now, I am going to send this jury out to the jury room and have this man who is on the jury, Milton W. Baumann, brought in here and I will ascertain whether he is the man and what the facts are, and if that is true, he will be excused from this jury and this alternate placed in his stead. I think that will clear this whole matter up and we will proceed with this trial.

Mr. Graff: May we have an exception to the Court's ruling?

The Court: Very well.

(Thereupon the following proceedings were had in open court:)

The Court: Gentlemen of the jury, and the alternates, you may retire to the jury room for the present and await the call of the baliff. You may retire at this time to the jury room.

(Thereupon the baliff returned to the court room with the juror, Milton W. Bauman, and the following proceedings were had:)

The Court: What is your name?

Juror: Milton W. Baumann.

The Court: Where do you live?

Juror: 1228 Fifth Avenue South, South St. Paul.

Mr. Graff: If the Court please, may I, for the purpose of the record, make a statement into the record at this time?

The Court: I will hear you in just a few minutes.

BLEED THROUGH

Mr. Graff: All right.

The Court: Did I ask you yesterday whether you had any tax difficulties with the State or Federal Government?

Juror: Yes, sir, and I told you I had. I said that I had difficulties and was straightening them out.

The Court: When did your difficulties begin?

Juror: Back in 1945.

The Court: Did you make a return to the Federal Government for 1950?

Juror: Not yet. I wrote and told them that I had wanted to make a return because I had some information to look up and I haven't completed it yet.

The Court: Did you make a return for 1949?

Juror: Yes, sir.

The Court: For 1948?

Juror: Yes, sir.

The Court: Did you pay taxes for either of those years?

Juror: No, I haven't paid it all. I still owe the Government money.

The Court: You are still indebted to the Government for 1948, are you?

Juror: Yes, sir.

The Court: 1949?

Juror: Yes, sir.

The Court: Have you paid all the taxes preceding 1948 to the Federal Government?

Juror: Well, that I wouldn't know exactly without—I have been paying but I don't know where it goes back to,

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but I know that there is—that I do owe the Government money. I just have not been able to pay it.

The Court: Have you made a return yet for 1950?

Juror: No, I have not. That return is easy to make because I did not work.

The Court: Have you made a return for 1951?

Juror: 1951, no, no tax on that, but I will make that when I make the '50.

The Court: You have not made the return yet for 1951?

Juror: That is right. I have to make out my '50 first.

The Court: Is this your signature?

Juror: Yes, sir.

The Court: You wrote that letter?

Juror: Yes.

The Court: How long have your tax problems, controversies with the Government been pending?

Juror: Well, since, I think it started in 1947—I am not sure—'47 or '48. That was when there was a correction in the '45 and '46 returns.

The Court: Some four or five years?

Juror: That is right.

The Court: You have been conferring at various times with officers of the Internal Revenue Department, have you?

Juror: Yes, with reference to collection of the taxes.

The Court: And with reference to how much the taxes were?

Juror: No, that was all straightened out, in, as I say, '47

or '48. I do not know what year it was that they brought up the matter of return for 1945 and '46.

The Court: You think your tax controversy with the Government is all straightened out?

Juror: Excepting what I owe them, yes. There is no question about—

The Court: When you have not made a return for 1950 and '51?

Juror: Well, it is not a controversy. It is just I have got information that I have to dig out for '50 and '51.

The Court: Well, you have not made a return, have you?

Juror: No, I have not. I asked for a continuation.

The Court: For 1950 and 1951?

Juror: That is right.

The Court: Do you know how much you owe for either of those years?

Juror: I don't owe anything for either year.

The Court: It is years prior to 1950?

Juror: That is right.

The Court: That you owe taxes to the Government?

Juror: Right.

The Court: You have been corresponding with officers of the Government about these tax matters, have you not?

Juror: Yes.

The Court: And you wrote this letter?

Juror: Yes.

The Court: To the Collector of Internal Revenue, your letter dated August 28, 1950, is that correct?

Juror: Yes.

The Court: How many times have you conferred with officers of the Internal Revnue Department of the United States?

Juror: I would not know exactly how many times. I have talked to several men. I have talked to Mr. Small of the South St. Paul office.

The Court: What others have you talked to?

Juror: Well, I would not know who I talked to over the phone. Those are the only people that have called on me.

The Court: Have you called at the Internal Revenue office and conferred with officers?

Juror: No, not lately I have not.

The Court: How long ago?

Juror: Well, I called when they wrote about the '50, I called up there and talked to someone. Now, who it was, I do not know, and asked him to send me another set of 1950 returns because I had—

The Court: Did you call at the office and confer with anyone there?

Juror: No, I did not go in personally. I called by phone.

The Court: Have you called personally and conferred with anyone in the Internal Revenue ofice?

Juror: No, I have not, not lately.

The Court: Not lately—how long ago?

Juror: Well, when I was called in back in 1947 or '48.

The Court: Did you file amended returns at that time?

Juror: Yes.

The Court: Was it prepared for you in the Internal Revenue Department?

Juror: Yes.

The Court: Who prepared it, do you know?

Juror: I do not remember his name, but he is not over there any more. I understand he went to California. I really do not remember his name. I could not dig it out—I could dig it out of the correspondence.

The Court: Why did you not make a full, fair statement of this matter yesterday?

Juror: I did. It was a matter of expenses which they did not allow and so we had to take what they would allow.

The Court: You had your tax difficulties thrashed out, settled, according to your statement yesterday.

Juror: That is right.

The Court: And that is not true, is it?

Juror: I owe the taxes, yes.

The Court: All right. And you have not made a return for 1950 and '51, have you?

Juror: No, I have not.

The Court: All right. Your matters have not been thrashed out and terminated as you said yesterday?

Juror: Well, it is a matter of filing the return. There is no tax, but I have a lot of details to get out.

The Court: I will ask you again why you did not explain this situation to the Court yesterday?

Juror: Well, I understood your question to say whether there was any controversy with the Government on taxes.

The Court: I asked you if you had had any controversies with the Federal Government pertaining to taxes.

Juror: I told you I had.

The Court: You said you had difficulty, but it was all thrashed out and settled.

Juror: Any controversy is thrashed out.

The Court: Well, I want to say to you that I do not think you made a full, fair statement to this Court and you are excused from this jury. You are excused for the present. You may stand aside.

Mr. Graff: If the Court please.

The Court: Mr. Graff, you may make your statement. Make your record.

Mr. Graff: I want to make my objection in the record. I assume that I can make it in open court since the jury is gone.

The Court: I assume that is true. I sometimes assume things in court and find I am mistaken. You may take it at the Bench if you desire, Mr. Graff.

Mr. Graff: Beg pardon?

The Court: You may make it at the Bench in the hearing of the Court.

Mr. Graff: At this time, if the Court please, the defendant wishes to object to what has transpired here this morning. May the record show that counsel for the Government has handed the Court a file, which file I presume is from the Bureau of Internal Revenue, which file the Court examined and read and which file—the Court asked Mr. Baumann whether he had signed a certain letter which apparently was on top of the file. If the Court please, this juror was accepted yesterday by the Court and by counsel on both sides. I have never seen this juror before in my life and I know nothing about him, except what was disclosed by the Court's interrogation of him yesterday.

It is apparent to me, and it must be apparent that what has transpired is either one or two things, or both. And let me speak frankly so there will be no question about it in the record. Either the Government people have had this list of prospective jurors and have checked the tax rolls to see whether any of these jurors have been involved in any particular kind of tax difficulties, or following the selection of this jury yesterday, a check was made of the particular individuals on this jury to determine whether there were any tax difficulties. It is impossible to conceive of how this particular file on this individual should be in the hands of counsel for the Government this morning unless that took place.

We believe that on the basis of the selection of this man as a juror yesterday, we have a right to this man on this jury. He was selected by the Court, counsel for both sides, and sworn in, and we believe that it is error to summarily bring this man before this Court, and if the Court please, to intimidate the entire jury panel by the procedure which has been followed. Taxpayers have a right, if the Court please, to contest their difficulties with the Bureau of Internal Revenue. The Bureau of Internal is not always correct, and every taxpayer has a right to contest his difficulties. I do not know anything about Mr. Baumann's troubles, but I would be the last person to say that he did not have the right to litigate whatever his difficulties are with the Bureau of Internal Revenue and to summarily dismiss him from the Jury, I think, is such error and creates such prejudice that it is absolutely incumbent that the Court declare a mistrial of this case at this time, and we so move.

The Court: The motion is overruled.

Mr. Graff: May an exception be allowed.

The Court: The officers of this Court were instructed in no uncertain language not to give out a list of jurors when

drawn for a term of this court. I have confidence in the officers and have no doubt but what they complied with the direction of the Court and the rule of the Court. Now, the jury was excused from this jury room when the matters pertaining to this juror, Baumann, were mentioned audibly. They have no knowledge—I suppose they have no knowledge of what has occurred and there is no reason for declaring a mistrial of this case. This trial may proceed forward before the jury, an alternate will be substituted for this juror who has been excused. The Court would be derelict indeed in not excusing a juror who had not been full and frank with the Court in disclosing his tax situation and whether he had any tax difficulties with the Government. Now, of course, he has got a right to defend in tax matters. He has got a right to refuse to pay taxes until it is known that he is indebted to the Government or the State for taxes, until he owes taxes. There is not any question about that.

Now, this is not a matter of recent occurrence. Obviously he has had difficulty down at the Internal Revenue Department for four or five years and on August 28, 1950, wrote a letter to the Collector of Internal Revenue about these tax difficulties that he has had. Well, his statements, I believe, were not frank with the Court and he did not furnish the Court the facts truthfully and that is why he is excused from this jury. This Court does not try cases with jurors who have not been perfectly frank, if this Court knows it. That is the reason why the Court has excused this juror but that does not mean that an alternate may not be substituted in his place and that will be done and this trial will proceed.

Mr. Graff: May the record show, Your Honor, that the defendant objects to the substitution of the alternate for the juror which the Court has now excused, in view of the circumstances disclosed by the record. Thank you.

The Court: Very well, the officers will bring in the jury.

Mr. Landrum: Could I approach the Bench, Your Honor, to get that file?

The Court: Very well.

Mr. Graff: If the Court please, before the jury is recalled, if I recall the admonition given by the Court to this jury yesterday, the Court said nothing about the reading of newspapers, listening to the radio broadcasts, or TV, watching TV.

The Court: I will just say this, Mr. Graff, it may cut it short. I have instructed the officers in charge of this jury to delete any matter in the newspapers about this trial and to not permit this jury to listen to radio broadcasts or observe what is transpiring on television unless they are very sure that they turn on to a program that does not contain anything in regard to this trial. The Court is using every effort at its command to see that this case is fairly and properly tried and hopes to be able to accomplish that very thing.

Bring in the jury. The jurors may be brought into court, Mr. Bailiff.

(Thereupon the jury returned to the court room and the following proceedings were had.)

The Court: Alternate Robert G. Larson will occupy the position first occupied by Alice F. Pfeiffer, who has been excused for reasons the Court deemed justifiable.

Mr. Milton W. Baumann has been excused and his place on the jury will be occupied by Mr. Frank P. Paddock.

Counsel may proceed.

Mr. Landrum: May it please the Court.

The Court: Mr. Landrum.

Mr. Landrum: Gentlemen of this jury, counsel, as a representative of the Government of the United States, it

is now my purpose to make what we call the opening statement in this case on behalf of the Government. Of course, I suppose you all know now that my name is Landrum. I am a Special Assistant to the United States Attorney for the District of Minnesota. In the beginning may I not say to you that we feel that this case may be somewhat disinteresting for you, that it may appear in the beginning to be what we may call a jumbled mess, but may I give you just a little comfort in that regard and say to you that I am sure that it shall be the effort of both sides to keep it just as clear and just as plain for you as it is possible.

As you know, the procedure will be, the Government will go ahead with its side of the case. We will endeavor to present to you the testimony which we feel will be proper in this case. It may be a little long drawn out and disinteresting in the beginning, but we shall, we hope, be able to in the end bring it all together for you so that it will be plain, clear, and concise.

And may I not also say to you gentlemen, it is not any pleasure to any of us to be here, none of us, but this is a matter of importance. It is a matter of importance to the people of the United States and to this defendant, and I say here and now, and I say in all humility and sincerity, that insofar as the Government of the United States is concerned we shall bring to you the evidence which we have discovered, every scintilla of it, and we shall know and we shall feel then that our duty has been performed, and we will pass the burden on to you.

This action, as you know, is one against Mr. Thomas W. Banks wherein he is charged, as his Honor has told you, under an indictment returned by a Grand Jury in this District with having attempted to evade and avoid the payment of certain income taxes. With the hope that it will not be burdensome to you, but with the sincere thought that it may be some help to you, I want to read you the indict-

ments, or the indictment—if counsel has any objection, I won't do it.

Mr. Graff: If the Court please, at this time we object to the reading of the indictment to the members of the jury on the ground that it is highly improper.

Mr. Landrum: Well, I would like for the Court to rule on that.

The Court: The objection is overruled.

Mr. Graff: May an exception be noted?

The Court: An exception may be noted.

Mr. Landrum: Gentlemen of this jury: His Honor, having ruled that I might be permitted to read this indictment, I am now going to read it from one end to the other, but inasmuch as what I have is only a copy, might I ask the Court to permit me to have the original from the file?

"United States District Court, District of Minnesota, Third Division, Criminal No. 7446. United States of America versus Thomas W. Banks, Indictment (26 USCA, Section 145) (b).

"The Grand Jury Charges:

"On or about the 15th day of January, 1946, in the City of St. Paul, Ramsey County, State and District of Minnesota, one.

"THOMAS W. BANKS,

late of Minneapolis, Hennepin County, Minnesota, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collector District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false

and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $20,170.11, and that the amount of tax due and owing thereon was the sum of $7,675.27; whereas, as he then and there well knew, his net income for said calendar year was the sum of $55,363.21, upon which said net income he owed to the United States of America an income tax of $31,454.61; in violation of Section 145 (b), Internal Revenue Code; 26 U. S. C. A., Sec. 145 (b).

"SECOND COUNT"

(26 USCA 145 (b))

"The Grand Jury charges that on or about the 15th day of March, 1947, in the City of St. Paul, County of Ramsey, State and District of Minnesota, aforesaid, one

"THOMAS W. BANKS,

the identical person named in the foregoing Count of this Indictment, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $27,100.99, and that the amount of tax due and owing thereon was the sum of $10,556.98; whereas, as he then and there well knew, his net income for said calendar year was the sum of $39,275.07, upon which said net income he owed to the United States of America an income tax of $17,942.34; in violation of Section 145 (b), Internal Revenue Code; 26 U. S. C. A., Sec. 145 (b).

"THIRD COUNT

(26 USCA 145 (b))

"The Grand Jury charges that on or about the 15th day of March, 1948, in the City of St. Paul, County of Ramsey, State and District of Minnesota, aforesaid, one

"THOMAS W. BANKS,

the identical person named in the First County of this Indictment, did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Minnesota, at the City of St. Paul, Ramsey County, Minnesota, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of $20,609.29, and that the amount of tax due and owing thereon was the sum of $6,955.29, and that the amount of tax due and owing thereon was the sum of $6,955.14; whereas, as he then and there well knew, his net income for said calendar year was the sum of $39.542.14, upon which said net income he owed to the United States of America an income tax of $17,817.24; in violation of Section 145 (b), Internal Revenue Code; 26 U. S. C. A., Sec. 145 (b).

"A TRUE BILL. Signed C. U. Landrum, United States Attorney. Robert Albrecht, Foreman."

THE COURT: Gentlemen of the Jury, I think I should charge you at this time that the indictment is not evidence against the defendant in this case. It is a formal charge returned by the Grand Jury and filed in this Court and merely constitutes the legal and proper method of bringing the defendant to trial. You may proceed, Mr. Landrum.

Mr. Landrum: Yes, Your Honor.

Now, gentlemen of the jury, as I said to you, in order that you may have as good an understanding as I am able to give you with relation to what the Government proposes to prove in this case, I desire to say to you that we will present from that witness stand witnesses who will testify with relation to the beginning of the investigation which brings us here today. We will present Mr. George McKusick, who will tell you that he is a Special Agent of the Intelligence Bureau of the—of the Intelligence Unit of the Bureau of Internal Revenue. He will tell you that he was specially assigned to begin this investigation, I think sometime in February, 1946. There will be at the same time and prior to Mr. McKusick, one of two Special Agents of the Bureau of Internal Revenue who will tell you that they, too, began an investigation about 1946 for the purpose of determining whether or not Mr. Thomas W. Banks had attempted to evade a substantial portion of his income taxes. They will tell you that they interviewed Mr. Banks. They will tell you that they interviewed his accountant, Mr. Weinstock. They will tell you that they interviewed and talked with attorneys and gentlemen who held a power of attorney for Mr. Banks. They will tell you that at that time they called upon Mr. Banks and upon his accountant for books, records, cancelled checks, and statements, which they might use in connection and for their use in making this investigation. They will tell you that they were not furnished adequate books. They will tell you that they were not furnished adequate bank statements. They will tell you that they were not furnished cancelled checks. They will tell you that they inquired as to whether or not Mr. Banks had any central control books of his own wherein and where by they might arrive at some conclusion with relation to the tax which he should have paid, and that they were informed that he had no central control books. They will tell you that their investigation brought out the fact that a large share of Mr.

Banks' income came to him through what we term "wagering", or gambling.

They will tell you that in their investigation they found sources from which he might derive an income, and having been faced with that situation, they will tell you that they then proceeded in this case, under what we call the net worth method.

Now, I am sure that both sides in this case will agree that the net worth method is no bugbear and it is no bugaboo. And pursuant to that investigation, which, as we say we will bring witnesses here to show you, started in 1946 and it winds up now, gentlemen of this jury, you and I are here.

Now, this net worth business, as I said to you, these witnesses will testify that they were unable to find adequate books. They will testify that their investigation disclosed to them assets which had not been shown in Mr. Banks' income tax returns, and they will tell you that in their search they found possible sources of income, and net worth means exactly what the words imply, "Net worth" is simply the difference between a man's assets and his liabilities. In that case, the Government will present to you what we call in the legal term a beginning point, and having that beginning point, which the Court will present to you, from there on it was simply a proposition of determining how much money Mr. Banks had at the beginning of the year and how much he had at the end of the year, taking his assets and deducting his liabilities and comparing the answer that you got with his income tax return for that year.

Now, that is as simple as I can put it to you. The Government will present to you an affidavit which Mr. Banks filed with the Government of the United States under date of July 2, 1937, wherein and whereby in connection with the compromise of a matter pending before the Alcohol Tax Unit, Mr. Banks, under oath, stated that he was insolvent. In that

affidavit he stated certain properties which he owned and certain properties which his wife owned. That is what we call the beginning point. That affidavit by Mr. Banks himself is the beginning point. An investigation was made with relation to the assets which Mr. Banks stated in that affidavit he owned and although he himself stated that he was insolvent, I think the witnesses for the Government of the United States, upon this witness stand, will tell you that they gave him credit at that time for not being insolvent, and started him off with assets—now, forgive me, I do not intend to misquote anything, and I do not intend to do anybody any wrong in the trial of this case; I have a duty. I think they gave him credit for $18,000.00.

That will be developed. In any event we have a starting point, that affidavit.

Now, it will be presented to you here in evidence on that stand that in the fall of 1950, I believe it was, Mr. George McKusick, who as the Special Agent that I mentioned to you a few moments ago, presented to Mr. O'Gordon, after conferences with Mr. O'Gordon, Mr. O'Gordon holding a power of attorney for Mr. Banks, Mr. McKusick presented to Mr. O'Gordon a list of questions which Mr. O'Gordon agreed that he would present to Mr. Banks for Mr. Banks' answer. Mr. McKusick presented that list of questions to Mr. O'Gordon. Mr. O'Gordon will come here. He is under subpoena by the Government of the United States. He will tell you that he got that list of questions from Mr. McKusick and that he went to Mr. Weinstock, who was Mr. Banks' accountant, and that he and Banks and Weinstock sat down together and answered practically all of those questions, and we hope to be able to present to you from this witness stand the answers that were given by Mr. Banks to Mr. O'Gordon and Mr. Weinstock for delivery to the Government of the United States.

In other words, we will present the list of questions which

Mr. McKusick presented to him, I believe in November, 1950, and we will present the answers which I believe the testimony will show came back in February, 1951, some three months after they had received them.

Now, in that statement there is this statement, and the Government of the United States in the trial of this case believes it will be able to present testimony which will show that insofar as the property is concerned, the property of Rita Banks was the property of Thomas Banks and acquired through and from him. In this question and answer statement, one question was presented with relation to whether or not Rita Banks stood separate and alone, and Mr. Thomas Banks in that statement made through Mr. O'Gordon and delivered to the Government through him said, "Rita Banks' assets acquired from Thomas Banks."

Now, in addition to that statement, as you know, in order that we may properly present this matter, it will be necessary for us to give to you in evidence in this case the income tax returns of Mrs. Banks and of Mr. Banks through these years. Mr. Banks in his own income tax returns took credit for taxes paid on their home, which I believe was in joint tenancy. In other words, Banks in his own income tax returns took credit for the taxes paid on the home which was either in Rita Banks' name alone, or was in joint tenancy.

Mr. Banks in his own income tax returns, which will be in evidence here, included the income from a place on Beard Avenue which was in the name of Rita Banks. Mr. Banks in this affidavit of July 2, 1937, recited that his wife, Mrs. Rita Banks, owned certain stock in the Realty Service Company, but in his own income tax returns, he took the capital loss on these stocks himself, although they were standing in the name of Rita Banks.

Mr. Banks, from his own returns, took the profit or loss on a farm, which you will learn to know as the Anoka Farm.

Banks himself in his own income tax returns, and I believe the defense will show that it was operated largely and most of the time at a loss, he deducted that loss from his own income tax returns even though the farm was in Mrs. Banks' name.

So it is the position of the Government that, of course, what is hers was his and what is his was hers and they are one and the same, a man and his wife.

In connection with this so-called net worth procedure, we will present to you witnesses from five different banks, at least, who will give to you their records with relation to the bank balances from time to time of Mr. and Mrs. Banks.

We will present to you certain file copies of the Government bonds which were owned by Mr. Banks or Mrs. Banks, or by one or the other of them, or jointly.

We will present to you certain file copies of numerous deeds which they received from time to time, wherein and whereby there was conveyed to them title to real property. We will present witnesses on this stand to show receivables that Thomas Banks got from many sources. We will bring to this witness stand witnesses who will tell you of his investment and Mrs. Banks' investment in stocks and bonds. We will bring witnesses to show investments in many operated companies. We will bring witnesses to show the extent of what he owed. We will bring witnesses here to show the mortgages which was against the different properties which he owned. We will show loans made and the accounts payable which he had.

We will bring here witnesses to show what transpired at conferences with Banks and with his accountant, Mr. Weinstock, and Mr. Weinstock will be presented on this witness stand as a witness for the Government. The Government has subpoenaed him and I trust he will be here.

The situation is that we expect to present from that

witness stand evidence that Thomas W. Banks wilfully failed to report a substantial part of his income for the years 1945, 1946, and 1947.

We will show what he said in his income tax statements was his income, and then we will present witnesses to show how much his wealth increased during that particular year that he made that income tax return, and to put it in a gereral way, for you and just as plain as I possibly can, and in general figures it will run something like this: For the year 1945, Mr. Banks' figures himself in his income tax return approximately $20,000.00. The Government figures, or what his actual income was that year, was $55,000. Then the income not reported would be approximately $35,000. I am giving it to you in round figures. I may be a hundred dollars or two hundred dollars off either way.

In 1946 Mr. Banks, in round figures, said $27,000.00. The Government, in round figures said $39,000.00. The difference in round figures is about $12,000.00.

In 1947 Mr. Banks said $20,000.00, the Government said $39,000.00, and the income tax not reported is between eighteen and nineteen thousand, according to those figures.

We shall undertake to bring to you every single scintilla of evidence that we have been able to uncover,

When we have presented that to you, the defendant will follow and present to you the defense that he has in this case. You will, of course, perform your duty under the oath that you took and when you have done that, your greatest recompense is going to be a consciousness of a duty performed.

I thank you.

ELMER P. HANSON, called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

My name is Elmer P. Hanson and I live at 1500 West Minnehaha, St. Paul, Minnesota. I have lived in St. Paul for 34 years. I am a Deputy Collector or Administrative Assistant of Internal Revenue for the District of Minnesota and I have held such office for 34 years. My office is located in the new Post Office Building in St. Paul. I am the official who has charge of the file and returns of income taxes paid within the District of Minnesota, and I have brought certain income tax returns into this Court room for use in the trial of this case. The following government exhibits are identified as follows:

Exhibit 1—1937 Individual Income Tax Return of T. W. Banks

Exhibit 2—1938 Individual Income Tax Return of T. W. Banks

Exhibit 3—1939 Individual Income Tax Return of T. W. Banks

Exhibit 4—1940 Individual Income Tax Return of T. W. Banks

Exhibit 5—1941 Individual Income Tax Return of T. W. Banks

Exhibit 6—1942 Individual Income Tax Return of T. W. Banks

Exhibit 7—1943 Individual Income Tax Return of T. W. Banks

Exhibit 8—1944 Individual Income Tax Return of T. W. Banks

Exhibit 9—1945 Individual Income Tax Return of T. W. Banks

Exhibit 10—1946 Individual Income Tax Return of T. W. Banks

Exhibit 11—1947 Individual Income Tax Return of T. W. Banks

Exhibit 12—1948 Individual Income Tax Return filed under the name of T. W. and Rita Banks signed by Thomas W. Banks and signed by Rita Banks.

Exhibit 13—1949 Individual Income Tax Return filed under the name of T. W. and Rita Banks signed by Thomas W. Banks and signed by Rita Banks.

Exhibit 14—1950 Individual Income Tax Return under the name of T. W. and Rita Banks signed by Thomas W. Banks.

Exhibit 15—1951 Individual Income Tax Return filed under the name of T. W. and Rita Banks signed by Thomas W. Banks and signed by Rita Banks.

Exhibit 16—1942 Individual Income Tax Return of Rita Banks.

Exhibit 17—1943 Individual income and victory tax return of Rita Banks.

Exhibit 18—1944 Individual Income Tax Return of Rita Banks.

Exhibit 19—1945 Individual Income Tax Return of Rita Banks.

Exhibit 20—1946 Individual Income Tax Return of Rita Banks.

Exhibit 21—1947 Individual Income Tax Return of Rita Banks.

Exhibit 22—Partnership Return of Income for the fiscal year ending March 31, 1947 for the Tenth Street Realty Company signed by T. W. Banks.

Exhibit 23—Partnership Return of Income for the fiscal year ending March 31, 1948, for the Tenth Street Realty Company.

Exhibit 24—1944 Partnership Return of Banks and Shepherd.

Exhibit 25—1945 Partnership Return of Banks and Shepherd.

Exhibit 26—1946 Partnership Return of Mrs. Rita L. Banks and Harry Shepherd.

Exhibit 27—1947 Partnership Return of Mrs. Rita Banks and Harry Shepherd.

Exhibit 28—1944 Partnership Return of Coin-A-Matic Amusement Company.

Exhibit 29—1945 Partnership Return of Coin-A-Matic Amusement Company.

Exhibit 30—1946 Partnership Return of Coin-A-Matic Amusement Company.

Exhibit 31—1947 Partnership Return of Coin-A-Matic Amusement Company.

Exhibit 32—1947 Partnership Return of Banks, Cary, Shepherd and Bortz.

Exhibits 1 to 32 inclusive are offered in evidence.

Q. (By Mr. Landrum.) Do you know, Mr. Hanson, whether or not Rita Banks, or Rita L. Banks, filed any income tax returns prior to the year 1942?

Mr. Graff: Just a moment. Objected to as immaterial.

The Court: (To the witness.) You may answer.

A. Yes.

Q. (By Mr. Landrum.) Did she file any prior to 1942?

A. I think not.

CROSS EXAMINATION

There are included certain papers such as powers of at-

torneys, agreements to extend the statute of limitations in some of the exhibits numbered 1 to 32 that were not with the tax returns when they were filed. Certain checks, marks and stamps were likewise not on exhibits numbered 1 to 32 when such tax returns were filed.

Mr. Graff: Now, if the Court please, with respect to Exhibits numbered 1 to 15, inclusive, objection is made because the exhibits include documents other than the tax return of this taxpayer. Now, I assume that those documents can be eliminated from those particular exhibits. Assuming that those particular exhibits have eliminated from them the extraneous documents, then there is no objection on the part of the defendant to Government's Exhibits 9, 10 and 11, provided it is understood that the marks and documents which were put upon them were put on them after the return was filed by the taxpayer.

Now, with respect to Exhibits 1, 2, 3, 4, 5, 6, 7 and 8, which represent the returns for the period '37 to '44, inclusive, they are objected to at this time on the ground and for the reason that they are incompetent and immaterial. Now, it may be that at a later date the Government may be able to tie them up, but certainly at this point of the lawsuit they are immaterial.

Now, with respect to Exhibit 12, 13, 14 and 15, other than the objection and observation that I have already made, these represent the returns of the taxpayer for the period '48 to '51 and they are objected to on the ground and for the reason that they are entirely incompetent and immaterial with respect to the issues.

Mr. Graff: Now, if the Court please, with respect to any return where there are papers included or attached to the return which were not on the return when it was filed, objection is made to the exhibit because of that fact. Assuming that those papers are going to be removed, our objection

to Exhibit 16, 17, 18, 19, 20 and 21, being tax returns of Rita Banks,—they are objected to because they are incompetent and immaterial at this time. It may be that later on they may become material, but I think at this time they are immaterial to any issues involved in this lawsuit and they are objected to for that reason.

Exhibits 22 and 23, being tax returns for the years '46 and '47 of the 10th Street Realty Company,— there is no objection to those, with the understanding, of course, that the marks that were put on them were put on them after the returns were filed.

With respect to Exhibits 24 and 25, being returns of Banks and Shepard, Exhibit 24 is objected to on the ground that at the present time, that being a '44 return, it is immaterial to the issues involved in this lawsuit. There is no objecton to Exhibit 25, which is the tax return for the year 1945, provided it is understood that the marks and figures that are on the return were put on after the return was filed.

As to Government's Exhibits 26 and 27, representing partnership returns of income of Mrs. Banks and Harry Shepard are objected to for the reason and on the ground that they are incompetent and irrelevant to the issues involved in this lawsuit at this time. It may be that at a later date they may become material, but we think at this point they are not material.

With respect to Exhibit No. 28, being the '44 return of the Coin-A-Matic Company, that is objected to at this time because it is deemed to be immaterial and irrelevant to the issues involved in the lawsuit at this point.

As to Exhibits 29, 30 and 31, they are the exhibits of the Coin-A-Matic Company for the years '45, '46, and '47. There is no objection to the reception into evidence of these three exhibits, provided it is understood that the marks, stamps

and so forth which were put on the exhibits were put on them after they were filed with the Collector's Office.

With respect to Exhibit 32, which is the '47 tax return of Banks, Cary, Shepherd and Bortz, there is no objection to that exhibit provided it is understood that the exhibit when received by the Collector's office did not have the marks and exhibits upon them, and there is removed from it a sheet which is attached to it, which this witness says was not on the return when it was filed in the Collector's office.

The Court: Has the Government the evidence to connect these exhibits,—make them competent?

Mr. Landrum: Of course, Your Honor, we do in our opinion. Now, with relation to these matters which are within those exhibits, about which we knew nothing when we brought them into this court room, they are offered here as official Government records and documents. We would be very happy, however, to remove from them the other documents which counsel has objected to. With relation to his objection upon the ground and for the reason that some clerks down in the Internal Revenue Office have made some checks on it, I understand that he says that he doesn't object to that providing we agree that they were put on there after the returns reached the Office of the Collector of Internal Revenue. We are perfectly willing to agree to that, with the exception of what I understand to be something which is on one particular return.

The Court: Do you know which one that is?

Mr. Landrum: I think it is the 1945 return on Thomas W. Banks.

Mr. Graff: If the Court please, my statement was that I had no objection to certain exhibits in evidence provided it was understood that these things were put on after the returns were filed. I did not ask anybody to agree to it,—just with that understanding.

Mr. Landrum: Yes. Well, we will agree to it except that on the 1945 return there is one stamp on there that I am a little captious about just when it was put on, Your Honor.

Mr. Graff: Let's look at it—

The Court: Perhaps you can settle that controversy right now.

Mr. Landrum: The notation to which I refer is upon Government's Exhibit 9, and it is the notation which says, "Received, January 15, 1948, Collector of Internal Revenue, District of Minnesota." Will you state, Mr. Witness, just what that stamp that I just read means?

Mr. Graff: I supposses that it speaks for itself as far as the record is concerned. I have no objection to having him explain the practice, if he is familiar with it.

The Court: (To the witness) You may make an explanation of the purpose for which that stamp is used,— why it appears on that exhibit.

The Witness: Well, we have two stamps down in our office. One, when a return is received in the office without a remittance, then it has got just a "Received" stamp on it. When it has a check or a remittance accompanying the return, then we put on it "Received with Remittance". That is the difference.

Q. (By Mr. Landrum) Well, what is that one, that stamp (indicating)?

A. This is a "Received"—just "Received on January 18th of 1948."

Q. You say it is the 18th?

A. It could be the 15th.

Q. Yes, it could be. Look at it carefully.

(Witness checks exhibit.)

A. It is stamped right over some printing. When I first

looked at it, it could be an "8", but now it looks like it is a "5".

Q. It is a "5", isn't it?

A. It looks very much—

Mr. Graff: I suppose that it will speak for itself.

Mr. Landrum: Yes, I will let it speak for itself.

Mr. Graff: All right.

The Witness: It looks more like a "5". It has got a little curve like a "5" would be there (indicating).

Mr. Landrum: All right.

Mr. Graff: Well now, just a moment. Is there any question that that stamp was put on after the return was filed by someone in the Bureau of Internal Revenue? Is there any question about that?

The Witness: It would have to be put on in the Office of the Collector of Internal Revenue. There is no question about that.

Mr. Graff: Yes. That is the only thing. We will argue later what it says.

Mr. Landrum: Your Honor, I think you will know the reason that I am a little captious about that.

The Witness: That is a "5". I think that is a very plain "5".

Mr. Graff: Well, just a moment.

(Government's Exhibit 9 handed to the Court.)

(Exhibit returned to Mr. Landrum.)

Q. (By Mr. Landrum.) Just one further question. Mr. Witness, I don't want to ask you something you can't answer, but is there anything shown in that Exhibit 9 which indicates the date upon which it was filed in the Office of the

Collector of Internal Revenue for the District of Minnesota?

Mr. Graff: That is objected to as improper redirect examination, —not in the course of the direct examination, and nothing having been covered on it in cross-examination.

Mr. Landrum: If Your Honor please, I ask to be permitted to ask the question.

The Court: Read that question, Mr. Reporter.

(The question was read.)

The Court: (To the witness.) You may answer.

A. I will have to answer that it was received January 15, 1946.

Mr. Landrum: Thank you, sir. We will be very happy to agree to remove from those exhibits all of those powers of attorney, and anything, if Your Honor please, that wasn't with them when they were filed in the Office of the Collector of Internal Revenue.

By Mr. Graff:

Q. Mr. Hanson, will you plase tell us what the practice is when returns are received in the Collector's Office with respect to their coming in by mail, let us say,—did they go to a mail room first, or what is done?

A. That is right, we have a mailing room, yes.

Q. I see, and someone in the mail room takes them and stamps them?

A. That is right.

Q. And are they necessarily stamped on the day that they are received?

A. Practically always we open all the mail that we get, open them the same day. We try to.

Q. Yes. Now, when you come to March 15th—

Mr. Landrum: This is January 15th.

Q. (By Mr. Graff) When you come to March 15th, Mr. Hanson, you have a lot of returns in your office, do you not?

A. Lots of them.

Q. Yes. Isn't it the practice in the Collector's Office at St. Paul, Minnesota to take all the returns that are in by a certain date and then stamp them later, because it is a physical impossibility to stamp them at the time?

A. That Could be.

Q. There is no question about it, is there? Doesn't that happen every year?

A. I am not in that division.

Q. You are not in that division. So you are not familiar with the practice that is followed down there with respect to stamping returns, is that correct?

A. That is correct.

Q. Who is the person that is in charge of that division?

A. Carl Giere, the cashier.

Q. Giere is the cashier,—correct?

A. That is correct.

Q. And is the mail room under his supervision?

A. That is correct.

Mr. Graff: In connection with the objections that were made, Your Honor, I would like to point out as to certain of the exhibits, that as to any returns for years beyond 1947, they could not possibly be material to the case here and I want to add that to the objection that I have already made.

The Court: Do you contend that the returns for 1951 are competent, and other years subsequent—

Mr. Landrum: (Interposing) Yes, Your Honor, they contain matters which we will connect up with the years with which we are concerned.

Mr. Graff: May I suggest, Your Honor, in view of the statement of counsel that the Court not rule on that unless and until that time comes.

The Court: I will withhold my ruling for further testimony in regard to these exhibits.

Mr. Landrum: Do you mean all of them, Your Honor, or just subsequent to—

The Court: Well, as to a large number, no objection was made.

Mr. Graff: That is right, Your Honor. There were certain ones as to which no objection was made. Those are the returns for the three years involved in the offense charged.

The Court: There is no objection to Exhibits 1 to 8, inclusive?

Mr. Graff: Oh, yes, 1 to 8, inclusive, are objected to. Those are the returns for '37 to '44?

The Court: That is correct.

Mr. Graff: We contend that they are certainly immaterial at this stage of the game. There is no objection to 9, 10 and 11, provided that those papers are removed.

The Court: I understand that they will be removed and not offered in evidence, that is, the powers of attorneys in these three exhibits mentioned.

Mr. Landrum: That is correct, Your Honor. If Your Honor has any question at all about the admissibility of those in the prior years, I would like to be heard if there is any question in Your Honor's mind.

The Court: I will not rule on them at this moment. There were some other exhibits to which objection was not made.

Mr. Graff: That is right, Your Honor.

Mr. Hoffmann: 22 and 23—

The Court: I think that is correct.

The Clerk: Also 25, 29, 30, 31, and 32.

The Court: There was no objection to 24 and 25, as I remember it, is that correct?

Mr. Graff: There is objection to 24, Your Honor.

The Court: But not to 25?

Mr. Graff: But not to 25.

The Court: I will withhold my ruling on the admission of those exhibits. You may proceed.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 21, 1952. Appearances are as has been heretofore noted.

The Court: Exhibits 1 to 32, inclusive, are received.

I believe there was no objection to 33. 33 is received.

Mr. Graff: If the Court please, there was an objection to 33 on the ground of its irrelevancy and its immateriality. There was no objection to it as being part of a file that was apparently in the possession of the Government.

The Court: Very well. The exhibit is received.

HOWARD W. MELBOSTAD called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 40 years of age and am employed as an Internal Revenue Agent in the Minneapolis office of the Internal Revenue Agent in Charge, St. Paul. I reside at 1472 West Larpenteur Avenue, St. Paul and have been employed in the position I now hold since the Fall of 1937 except for a period from April, 1942 to February, 1946 when I was in military service. I graduated from the University of Minnesota in 1935 with an accounting major and a degree from the business school. After graduation I was engaged in accounting work until I started working for the government.

The income tax returns filed by Thomas W. Banks were assigned to me for examination in October or November of 1946. The first thing that I did was to analyze the tax returns and I decided that they should be examined and income deductions verified. The examination was made by me jointly with another Revenue Agent, Thomas McCart. We had one interview with Mr. Banks in the office of his attorney at that time, Mr. Meshbesher. We asked Mr. Banks questions about his 1941, 1942 and 1943 returns seeking explanations of items on the returns. We did not receive any definite information that was of any value to us. We asked him specific questions about various items on the returns and I do not recall receiving any answers to them other than to be referred to the accountant, Mr. Weinstock or to Mr. Meshbesher to obtain the answers in the future. We did go to these people to get the answers but we did not get any answers. I asked Mr. Banks if he had any personal books and all I recall is that he referred me to his accountant and said that the accountant would have any records that were available. The accountant did not show me any personal control books covering the activities of Thomas W. Banks and I did ask him for such books. The accountant was Mr. Weinstock.

Cross Examination

The conference that I am speaking of took place in the office of Mr. Meshbesher in Minneapolis. I asked for the opportunity of speaking to Mr. Banks and in response to my request, the meeting was arranged. I do not recall Mr. Banks telling me and Mr. McCart that as far as he was concerned there was not any tax that he owed. I kept no record of the conversation and I am testifying here upon my recollection of what happened at that time. Mr. Banks did tell us to see Mr. Weinstock as Mr. Weinstock had whatever books and records were available. I kept no notes of the conference. I have a diary but I have not checked my

diary and I do not have the diary with me. I have not used any diary to refresh my recollection as to this particular conference. I do not keep a very accurate diary. It is not required. I could bring my diary into Court. I did not make any official report and I did not regard the conference as being of sufficient consequence to make any report. To my knowledge Mr. McCart did not make a report of this conference. Shortly after my conference with Mr. Banks I quit working on this case. I do not recall whether Mr. Banks told me and Mr. McCart that if he owed any taxes he would be glad to pay them.

Q. (By Mr. Graff) Well, would you be back in court and bring with you your diary so that we may see what kind of an examination or report you made at that time?

Mr. Landrum: If the Court please, we are just beginning this trial and I do not like to be captious, but we are bringing one witness back, the first man on here. Now, we are bringing another witness back and I wonder when we are going to get through with the cross-examinations.

The Court: Well, I think it is proper for the witness to return at 2 o'clock and return to the stand if he is called. Are you through at this time?

Q. (By Mr. Graff) This is the year 1946, Mr. Melbostad?

A. Yes.

Q. And may I ask what years you were checking for? The returns for what years?

A. That was 1941, '42 and '43.

Q. I see. Would you also check during the noon hour to see what report, if any, you made at that time?

A. Yes.

Q. And bring it with you.

Mr. Lord: If the Court please, before recess, it was my understanding that Counsel was not finished with his examination of Howard Melbostad. He was supposed to return here with his diary. I believe it would be in order at

this time for Mr. Melbostad to take the stand and have Counsel finish examining him.

The Court: He may come forward.

Whereupon, HOWARD W. MELBOSTAD was recalled as a witness and, having previously been duly sworn, testified further as follows:

Cross-Examination (Continued)

By Mr. Graff:

Q. Mr. Melbostad, it is my recollection that you were to check and see whether you had a diary reflecting what happened and when it was that you were at Mr. Meshbesher's office, is that correct?

A. Yes.

Q. Did you find the diary?

A. I went back to Minneapolis and got the diary but in examining it, I do not find there is any notation in it. This is just an appointment book is all it is.

Q. I think you will have to speak so people can hear you.

A. I say this is merely an appointment book. That is the only type of a diary I ever keep.

Q. I see.

A. And there is nothing in it about that conference with Mr. Banks.

Q. May I see it a moment, please?

Mr. Lord: If the Court please, the witness has not testified from the diary and I do not think it is in order for Counsel to have it.

The Court: It is not in evidence yet.

Mr. Graff: He has used it, Your Honor, for the purpose of refreshing his recollection with respect to it and under the circumstances, I think I am entitled to cross examine him concerning it if I should wish to do so.

The Court: The objection is sustained. I think we will

not go into that unless it becomes more material and more important than it is at this time. He has looked at it to see whether or not he made a certain entry in regard to a matter and found nothing of that kind.

I did not make a report to Mr. Hanson concerning the interview but he may have discussed it with him. There would be no report made but there would be work papers. These work papers would be the combined work papers of myself and Mr. McCart. The work papers were left with the income tax returns when we discontinued work on the case and the entire file was turned over to the other agents. I do not know whether these work papers would be in the possession of Mr. Hanson or not.

Q. Now, Mr. Melbostad, when you were on the stand this morning, a part of the thing that we asked you was to check and see whether there was a report of some documents made by you and Mr. McCart which were filed in the office of Mr. Hanson. Do you remember that?

A. Yes.

Q. Yes. Did you make such examination?

A. To find out if we had made a report on what? I don't understand your question.

Q. Mr. Melbostad, when you were here this morning, we asked you to go to your office in Minneapolis and check and see whether there were any reports. Now, by reports I mean writings that you made as the result of your investigation, together with Mr. McCart, of the taxpayer, Mr. Banks, and you said you would check and see. Do you remember that?

A. I do not recall that. I recall saying I would look for my diary and bring it back and that I did.

Q. Well, I am quite sure that I asked you, Mr. Melbostad. In order that there may be no question about, would you please check now with your office and come back tomorrow and tell us what you find as a result of that check.

Mr. Landrum: If the Court please, I am going to object

to that upon the ground and for the reason that it doesn't make any difference in this case whether he made a report to his office or not, and if he did make it, Counsel certainly would not be entitled to it.

The Court: Well, of course, this witness has said many times that he did not make a report.

Mr. Landrum: That is right.

The Court: That he had some work sheets and turned them in. Now, I think we have devoted about enough time to this phase of the case. That is my idea.

Mr. Graff: Well, I think, Your Honor, if I recall correctly, he said he would check and see at his office whether those papers were there.

The Court: Well, I do not remember of any such understanding. He was to get his diary and check up on some matter.

Mr. Graff: I wonder, may we check with the Reporter and see whether that—

The Court: Oh, we are not going to try to find that in the testimony of this witness that came in earlier in the trial some hours ago. Now, if you can get the Reporter to spend the time to check his notes this evening, you may use them.

GEORGE H. MCKUSICK called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination.

I will be 48 years of age on June 5th of this year. I graduated from high school in 1924 and I then went to work in a wholesale warehouse as an order clerk at Duluth, Minnesota in which work I remained for a little more than a year. Thereafter I went to work as a camp clerk doing timekeeping and accounting for a lumber company in northern Min-

nesota. I started as camp clerk and became auditor and my employment lasted about two and one-half years until August, 1929. Thereafter I went to work for the Clear-Flax Linen Looms as assistant bookkeeper at Duluth, Minnesota in which concern I was promoted progressively until February, 1939 when I became auditor for the concern. As auditor I was in charge of the corporations records, prepared financial statements and was in charge of all inventories. They employed about 175 to 200 employees. When I left their employ I became employed as a general deputy clerk for the Unjust Enrichment Unit of the Bureau of Internal Revenue. Following the invalidation of the agricultural adjustment act, an act was passed taxing processing taxes in the amount of 80 per cent and it was my duty to make the determination of the amount of the tax. I was an auditor for port processors and millers, that is wheat processors. It was my duty to go into the corporate records and reallocate their overhead and taxes and finally arrive at what would be an equitable showing both to the government and the taxpayer. I generally end up with a tax. I did that work for about a year and a half and then on March 15, 1941, I became a special agent in the Intelligence Division of the Treasury Department and I have been so employed since that time. As such special agent we investigate allegations of fraud in income tax matters and make personnel investigations. Most of the tax cases we handle are concerned with allegations of evasions of income tax and I have handled between 50 and 60 cases. I was assigned the tax returns of Thomas W. Banks. I first began the preliminary phase of my investigation on April 2, 1946. I was assigned to work with Harold Lane of Washington, D. C., to ascertain whether complaints that had been received regarding possible payments of graft to city officials had been properly reported for income tax purposes and in that connection other returns were examined. We made inquiries of the Bureau and then obtained all original returns not assigned and then we made contact with the revenue agents who had previously been assigned

in a routine manner. It is doubtful whether Howard Melbostad was contacted or his superiors in order to get the results of their work. We simply retrieved the returns that were out. When it was decided to embark on an investigation by our office, we obtained the returns we wanted from revenue agents who had been assigned them in a routine manner so that they would not close out the return during the period of our investigation. The returns of Thomas W. Banks were among those called in. This was the latter part of 1947.

Q. Now, Mr. McKusick, what did the first phases of your investigation itself involve?

A. Initially we made routine inquiries of the books, that is, the banking houses, the banking houses where Mr. Banks was rumored to have accounts. We found some bank accounts, but they were practically not interesting.

Mr. Graff: Just a moment. I move that that go out as being hearsay as far as this witness is concerned. The records would be the best evidence of that.

The Court: Well, he is stating his own conclusion about what he found. It may remain in the record. It has been given.

Q. (By Mr. Lord.) And what did you next do?

A. We surveyed all of the sources of income on Mr. Banks' return, looking to examination of the income tax liabilities of these various ventures to ascertain whether or not there was any diversion by these ventures whereby Mr. Banks could have received money indirectly.

Mr. Graff: Well now, just a moment. I don't mind this witness telling us what he did, but I don't think it should be infiltrated with his reasons for doing it, which is not competent testimony on the part of this witness.

The Court: Read the last question and answer, Mr. Reporter.

(The question and answer were read.)

The Court: Well, now, that is not stating facts that I think are prejudicial in any way. This witness is merely stating what they did and why they did it. He hasn't stated in any way what was ascertained. You may proceed. The objection is overruled.

After we examined those returns we requisitioned the office file. We then formed in groups; there were about seven or eight special agents who were assigned to this special investigation and these seven or eight special agents were divided into groups of two or three and each one assigned to work a bank. We were given instructions to examine the fronts and backs of every cashier's check, bank money order and certified check which these banks handle. The material obtained by each group was thrown into a pool and correlated and associated with respect to whichever taxpayer it related to. I met Mr. Banks in 1947 at Brady's Bar. The next time I met Mr. Banks was early in 1951. My reasons for contacting him were that we were having some trouble properly correlating the land in connection with the Anoka farm. I called Mr. O'Gordon who was then representing him and then I called Mr. Philip Brancheau through whom Mr. Banks had made some acquisitions of property and I could not locate either one so I called Mr. Banks who told me that either Mr. O'Gordon or Mr. Brancheau would be available the next day. The next time I contacted Mr. Banks was on June 4, 1951. The occasion for that meeting was a meeting which I had requested. It was held in the office of Mr. Weinstock, Mr. Bank's bookkeeper and auditor. Present were Mr. Banks, Mr. Weinstock, Mr. Kleven of the Bureau of Internal Revenue and myself. Mr. Kleven and I had completed the determination of income and I explained to him that there was unreported income and I xplained that in accordance with the Bureau policy he was going to be given at that time an opportunity to explain the differences.

He asked me how much time I had and I explained that Mr. Kleven and I were leaving town and we would be gone about two weeks. In the course of my investigation I did not see any personal books and records of Mr. Banks. I made inquiry concerning such books of Mr. Weinstock who prepares Mr. Banks' income tax returns and is also his bookkeeper-auditor for various of his ventures. I inquired of Mr. Weinstock with reference to checking accounts of Mr. Banks. Mr. Weinstock gave me incomplete checks on the Marquette National Bank account and he gave me some checks on the farm account of the First National Bank of Anoka. All I can recall is that in some years a bank statement or two would be missing and in some cases some of the checks were missing out of some of the statements. The checks given to me on the Anoka bank account were fairly complete; they had to do with the expenditures on the Anoka farm. No other personal records of Mr. Banks were furnished to me by Mr. Weinstock. In the course of my investigation I have seen papers which have been signed by Mr. Banks and I am familiar with his signature. Exhibit No. 33 is offered in compromise which I requisitioned from the miscellaneous tax unit of the Collector's Office in St. Paul. The signature on the last affidavit contained in Exhibit 33 is the signature of Thomas W. Banks. Exhibit No. 33 is offered in evidence.

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Graff: Did the Court have an opportunity of seeing Exhibit 33 at all?

The Court: Very hastily. I did not read it carefully.

Mr. Graff: I wondered whether, for the purpose of understanding my objection, whether the Court probably should examine it.

The Court: You may make your objection. I think I will remember it substantially.

Mr. Graff: All right: If the Court please, on examination of Government's Exhibit 33 it appears to me to be as follows: The face sheet appears to be a typewritten copy of an offer in compromise, which is not signed, to which are attached, first, a letter, a carbon copy of a letter, apparently written by one F. P. Hensler, as a Deputy Collector, written to the Collector. The third part appears to be a copy of an affidavit of a man by the name of Peter Valder. The fourth part appears to be an affidavit by one Motley Berman. The fifth part appears to be an affidavit by one Abe Brownstien, spelled B-r-o-w-n-s-t-i-e-n. The sixth part appears to be an affidavit by the defendant in this case. The seventh part appears to be an affidavit by one Isadore Blumenfeld. I think these are all copies, but some of them have been signed.

Now, first of all, of course, all the documents in the various parts are objected to on the ground that they are hearsay. The letter from Hensler to the Collector is very clearly hearsay. The affidavits of all of the people with the exception of the defendant are very clearly hearsay. With respect to the affidavit of the defendant, we object to that on the ground of its immateriality, on the ground and for the reason that as to the defendant, the offense charged here is the attempt to evade and conceal a substantial portion of the income tax which should otherwise be paid during the years '45, '46, and '47. This affidavit is dated July 2, 1937, and we contend it's irrelevant and immaterial with respect to the issues involved in this case. Now, with respect to the other portions of this Exhibit, other than the defendant's affidavit, objection is further made in addition to the ground of hearsay that they are entirely immaterial and irrelevant to the issues involved in this case. And particularly the letter from the Deputy Collector to the Collector is objected to on the further ground because it contains statements which are not only self-serving, but

are inflammatory in nature, which would be very apparent on a reading of them.

There is also attached to the face of the Exhibit an enclosure from the Department of Justice which I presume does not belong on there in any event.

Mr. Landrum: With relation to the Exhibit 33, if the Court please, the testimony of this witness goes to the affidavit of this defendant, Thomas W. Banks. The testimony of this witness is that that is the original signature of Thomas W. Banks. The objection insofar as that affidavit and that portion of the Exhibit is concerned is simply that it is immaterial in that it is in 1937. The Government, therefore, now proposes and will remove from this Exhibit all portions thereof except the affidavit of the defendant, Thomas W. Banks, which this witnss has identified as being signed with the signature of this defendant, Thomas W. Banks. That affidavit, within the body of it, recites and refers to a list which is attached. So we now reoffer this Exhibit, consisting solely of the affidavit of Thomas W. Banks, with the list attached to it.

The Court: Very well. I will examine the Exhibit more carefully and undertake to rule tomorrow morning on it, and these other Exhibits.

Mr. Landrum: In order that the record may be perfectly clear, it is my understanding that this witness has also identified that affidavit as an official Government record. Now, if Your Honor please, if you have any question about the remoteness of it, we would like to be heard on it, because that is the foundation stone for this case.

The Court: There is no objection, then, if this affidavit of this defendant is offered separately?

Mr. Graff: Only as to its relevancy and remoteness, Your Honor.

Mr. Kyle: We will not object to the foundation which has been laid.

Mr. Landrum: That is fine, Your Honor. Let us take it off.

The Court: You may take it off.

Mr. Landrum: Yes, Your Honor.

(The following proceedings were had in open Court:)

The Court: I understand that the affidavit of the defendant is being separated from the balance of Exhibit 33 and is being offered?

Mr. Landrum: Yes, Your Honor.

The Court: And the other portion of the Exhibit is being withdrawn?

Mr. Landrum: Yes, Your Honor, and inasmuch as the writing of the Clerk of the Exhibit number is on the other portion of the Exhibit, might we have that number put on that portion of the Exhibit which is now being offered?

The Court: Number 33—

Mr. Landrum: 33, Your Honor.

The Court: 33, yes.

Mr. Graff: No objection, Your Honor.

The Court: That may be done.

(End of Proceedings at the Bench outside the hearing of the jury.)

Q. Now, Mr. McKusick, I ask you from the books and records that were made available to you, were you able to make a determination of this defendant's income for the years 1945, 1946, and 1947?

Mr. Graff: Just a moment. I object to that on the

ground there is not sufficient foundation laid for that question.

The Court: You may answer.

A. I was not.

Q. (By Mr. Lord.) What method did you use, Mr. McKusick, in arriving at your determination of this defendant's income for the years 1945, '46, and '47?

Mr. Graff: Just a moment. I will object to that on the ground that there is not sufficient foundation laid. There has been no basis at all for any showing that this witness made any computation of income, or, if so, from what.

The Court: You may answer the question, if you can.

A. I could answer that question but it would be—I would have to give some background, Your Honor. It was arrived at by sequence of various methods.

Q. (By Mr. Lord.) Will you tell what those methods are, Mr. McKusick?

A. We first tried the direct income method. By that I mean we made comparisons with what was disclosed in our investigation with what was reported on the returns. There were some omissions of taxable items on the returns, but they were unimportant. I next applied the bank deposits, gross bank deposits method, and after some consideration of this method, I discarded it as being inequitable, both to the taxpayer and to the Government. Then I applied what is referred to as the receipts and disbursements method, which is a variation of both. This, too, would have been inequitable, both to the taxpayer and to the Government. So then I made a request of Mr. Weinstock, the taxpayer's auditor, for Mr. Banks' records, and he stated that to his knowledge—

Mr. Graff: Just a moment. We object to having this witness state anything that Mr. Weinstock stated to him on the ground that is hearsay.

The Court: Yes, that would not be competent.

Q. (By Mr. Lord.) Mr. McKusick, had Mr. Banks referred you to Mr. Weinstock to obtain information with respect to his income tax returns?

A. Well, I had no direct contact with Mr. Banks as to his books and records.

Q. My question —

Mr. Lord: Will you read the question, Mr. Reporter?

(The question was read.)

A. No.

Q. (By Mr. Lord.) Mr. McKusick, will you state what method you used in arriving at the figures which you arrived at with reference to this man's income tax returns.

Mr. Graff: Just a moment. The question seems to infer that this witness has arrived at certain figures. Well, we haven't the slightest knowledge or intimation of what those figures might be and I think the question in any event is premature.

The Court: You may answer the question.

A. We applied the net worth method.

Q. (By Mr. Lord.) Now, what was your reason for applying the net worth method in this case?

Mr. Graff: Objected to as incompetent, irrelevant, and immaterial, and calling for a conclusion and not a statement of fact.

The Court: The objection is overruled. You may answer it.

A. Under Section 41 of the Internal Revenue Code, provision is made whereby if the taxpayer's method of reporting his income is inconsistent with his method of bookkeeping, or that no such bookkeeping records were kept, the Commissioner may make correction of that method of reporting income. Now, I was acting under authority con-

ferred on me by the Commissioner in setting up this net worth method.

Q. (By Mr. Lord.) Now, how did you go about setting up—strike that, if you please. I ask you why you decided that you should use the net worth method?

Mr. Graff: That, if Your Honor please, calls for a conclusion, and not a statement of fact, and is objected to for that reason.

The Court: You may answer that question, if you can.

A. Because there were no control records.

Q. (By Mr. Lord.) Mr. McKusick, how did you go about constructing this, the picture of this man's financial activities by the net worth method?

A. I summarized the results of our investigation, classified variously under assets and under liabilities. I subtracted the total of the liabilities from the total of the assets.

Q. Go on.

A. And I did this operation for each year of the period January 1, 1941, through December 31, 1947. My comparison—I compared the net worth at the end of the year with the net worth at the beginning of the year and from that, or to that difference I added living expenses and made other adjustments, which would arrive at what the taxpayer should have reported in income in that year.

Mr. Lord: If the Court please, I have called this witness for the specific purpose of laying a foundation for the use of the net worth system in this case in arriving at the income which the Government has charged here. I should like the Court's permission to withdraw the witness at this time and turn him over for further examination with permission to later present further evidence by and through this witness.

The Court: Do I understand that you surrender this witness at this time for cross-examination?

Mr. Lord: Yes, Your Honor.

The Court: Very well.

Mr. Landrum: But with the understanding, if the Court please, that he may be recalled, as I understand —

The Court: And testify further on direct.

Mr. Landrum: Yes, Your Honor.

The Court: As to the net worth method.

M.r Landrum: Yes, Your Honor.

The Court: Well, —

Mr. Graff: I would prefer, of course, Your Honor, to have them finish with this witness and then turn him over to us. It would appear to be much more orderly than the method suggested.

The Court: Well, it would seem to me so, but if that can't be done at this time, you may call another witness.

Mr. Landrum: If Your Honor please, Counsel has been objecting all the time to the fact that we have not laid a foundation. Now, we have laid the foundation. We have put this witness on to lay the foundation for the testimony with relation to the net worth method and we have surrendered him for the purpose of cross-examination insofar as we have gone. However, it will be necessary to bring him back to proceed with further testimony. We put him on here just to show we have a right to proceed under the net worth method. That is all we have done so far.

Mr. Graff: Well, I do not agree with the statement of Counsel and I suggest, Your Honor, that they complete with this witness before they turn him over for cross-examination.

Mr. Landrum: That is impossible.

Mr. Graff: Well, then I suggest that they proceed with their direct examination of this witness.

The Court: That may be done. This witness may be excused for the time being. Call your next witness.

JOSEPH A. O'GORDON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination.

I am 65 years of age and live at St. Louis Park, Minnesota. My occupation is that of a lawyer. In 1950, I represented Thomas W. Banks as lawyer and attorney. I communicated with special agent George McKusick with reference to the tax returns of Thomas W. Banks.

Do you recall a meeting in the office of Mr. Stone, the head of the Special Agents in St. Paul in the summer of 1950?

A. I think that was in the fall of 1950.

Q. Would it be in about August?

A. I cannot recall the month.

Q. Could you tell us what was the purpose of that visit?

A. Well, that depends upon who you mean. From my point of view or theirs?

Mr. Graff: Well, just a moment. May I ask this witness a few questions, Your Honor, for the purpose of making an objection?

The Court: Yes. Pertaining to foundation.

Q. (By Mr. Graff.) Mr. O'Gordon, did I understand you to say you are a lawyer?

A. Yes, sir.

Q. And did you during 1950 represent Mr. Banks in connection with certain of his matters?

A. Yes, sir.

Q. And did you represent him in connection with some of his tax matters?

A. Yes, sir.

Q. Now, was the meeting which you had in the, late in the year of 1950 in connection with the tax matters of Thomas Banks?

A. They were.

Q. And did you represent him at that particular meeting as an attorney for Tom Banks?

A. Yes, sir.

Mr. Graff: At this time, if the Court please, we will object to any testimony by this witness on the ground that any information that he obtained in connection with the tax matters of Tom Banks were acquired as an attorney and, therefore, would be privileged, and the client and the taxpayer has not given any consent to permit his lawyer to speak in violation of that privilege.

Mr. Landrum: If Your Honor please, might I suggest that a discussion of this matter, I feel in fairness to all, should take place outside of the hearing of the jury. There certainly is another side to it, Your Honor, and it is going to take, I feel, just a little while to acquaint Your Honor with the true situation; and I feel it should be not in the presence of the jury because I don't want to prejudice anyone by anything we say.

The Court: When I adjourn Court I am willing to hear Counsel for the respective parties in regard to the matter you have mentioned.

Mr. Lord: Mr. Joe O'Gordon.

Mr. Graff: May we approach the Bench a moment, Your Honor?

The Court: You may come forward.

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Graff: At the close of the session last evening, or shortly before the close, the Court indicated what its views would be with respect to the competency of the testimony of Joseph A. O'Gordon. Because of the importance of the point, I might say that a careful reading of the Himmelfarb case cited by counsel for the Government indicates that that case is not necessarily authority for the proposition here contended as that concerned the competency of the testimony of an accountant. We would like, in view of the Court's indication yesterday, to have a general objection to any and all testimony of this witness on the ground that his testimony is incompetent because it is privileged. Rather than make that objection to each and every question, I wonder if we could have that general objection running to all of his testimony?

The Court: That may be understood.

Mr. Graff: Thank you, Your Honor.

The Court: It might be well to present an objection to questions of a serious nature so that the Court might sustain the objection. That is the problem.

Mr. Graff: I did not want to be in the position, Your Honor, of objecting to every question when the Court had indicated its ruling.

The Court: You want to avoid that and that is very proper.

Mr. Hoffmann: Perhaps then to expedite examination and to preserve the objection that Mr. Graff has to any particular question, could we then — as indicated by Your Honor, that might well be the basis of a then special objection — merely say "Objection" for the purpose of having the Court rule on that particular question without repeating the grounds.

Mr. Lord: That would be more desirable from the Government's point of view, Your Honor.

The Court: Very well.

(Thereupon the following proceedings were had in open court:)

Mr. Lord: For the purpose of the record, Your Honor, in order to expedite the proceeding, I would withdraw the question which I have heretofore asked Mr. O'Gordon and start over again with his testimony.

JOSEPH A. O'GORDON called as a witness on behalf of the United States, further testified as follows:

Direct Examination

In the Fall of 1950 I had occasion to go to the office of Arthur Stone, head of the special agents of the Bureau of Internal Revenue. While there together with Mr. Stone, Mr. Meshbesher, Agent McKusick and Agent Thomas, we discussed the income tax liability of Thomas W. Banks.

Q. Did you then request that those officers furnish you with a list of questions and that you would then submit the questions to Mr. Banks and return his answers:

A. I answer the question, yes, but it did not originate with me.

Mr. Landrum: The answer is yes?

The Witness: Yes, it was discussed, yes.

Q. (By Mr. Lord.) And did you agree to take these questions to Mr. Banks and return with the answers?

A. I do not recall ever — I do not remember suggesting that I would take them to Mr. Banks but I did agree that we would accept the questions and try to answer them, for the purpose of settling a civil tax —.

Q. (By Mr. Lord.) I am going to ask you for a yes or no answer.

A. Yes.

Mr. Lord: And, if the Court please, may I have permission to cross-examine this witness?

The Court: I think there is no occasion for that at the present time. Just proceed with the examination.

Q. (By Mr. Lord.) Now, Mr. O'Gordon, was such a list of questions submitted to you?

A. Yes, sir.

Mr. Graff: May the answer go out just for the purpose of making an objection, Your Honor. There is another point that has arisen. It appears from the questions which have been asked that another lawyer was present at this conference, Mr. Meshbesher. Now, we are going to make the further objection to this line of testimony because of the privilege that would exist between the taxpayer, Mr. Banks, and Mr. Meshbesher. May that be added to the other general objection, Your Honor?

The Court: Objection is overruled. You may answer.

I was recently served with a subpoena duces tecum requesting me to bring the original questions which were submitted to me. I did not bring them because I was unable to find them. The questions were given to me about December, 1950.

Exhibit 34 is a power of attorney running from Mr. Banks to me and is dated November 22, 1950. I do not recall who I gave it to but I filed the power of attorney. I presume with Mr. McKusick.

Exhibit 70 consisting of 7 pages is a copy of the list of questions which were submitted to me.

Mr. Lord: Government's Exhibit 70 is offered in evidence, Your Honor.

Mr. Graff: With respect to Government's Exhibit 34, Your Honor, it is objected to on the ground that it will not tend to prove or disprove any of the issues in this case. It has no probative value as an exhibit. That it is a power of attorney running from the taxpayer to Mr. O'Gordon, there

is no question about. We do not see how it tends to prove or disprove any issues involved in this case and it is objected to for that reason.

The Court: I would like to see it.

(Exhibit handed to the Court.)

The Court: Exhibit 34 is received.

Exhibit 70 also contains answer to the questions. Government's Exhibit 71 consisting of two sheets is the list of answers that I submitted to Mr. McKusick. Exhibit 71 contains the same answers that are on Exhibit 70. Exhibits 70 and 71 are offered in evidence.

Mr. Graff: Exhibit 71 is objected to for three reasons. The general reason, or rather the general objection which has heretofore been given to the Court; the second objection is that these answers, according to this witness' testimony, were submitted as part of a proposed civil settlement. For that reason we feel that they are inadmisible in this proceeding. And, thirdly, with respect to Exhibit 71, we feel that the writing in the upper righthand corner of Exhibit 71 is hearsay and not properly a part of that exhibit.

With respect to Exhibit 70, we make the same general objection which has already been made, and the further objection that the answers were submitted to the questions as part of a proposed settlement in a civil case. It is objected to for that reason.

The Court: The exhibits are received.

Cross-Examination.

At the conference in Mr. Stone's office had the latter part of 1950, in addition to Mr. Meshbesher and myself, Mr. Peter Masica may have been there together with Mr. McKusick and Mr. Walter Thomas.

Q. What was the purpose of the conference held in Mr. Stone's office at that time?

A. It was my understandng that that conference was arranged for the purpose of discussing a civil settlement of a civil liability if any existed for this taxpayer.

Q. And were these questions submitted and were the answers submitted pursuant to the understanding that they were to facilitate a civil settlement, if any tax liability existed?

A. Yes, sir.

Q. Did you have that in mind when you submitted the answers reflected by Government's Exhibit 71 to Mr. McKusick?

A. Yes, sir.

Mr. Landrum: The government offers in evidence the following exhibits:

Exhibit 37—Sheriff's Certificate, Frances Jedlika to Thomas W. Banks and wife.

Exhibit 38—Quit Claim Deed from Gordon Pribble to Thomas W. Banks and wife.

Exhibit 39—Warranty Deed from Gustaf Schlenker, et al, to Rita Banks and husband.

Exhibit 40—Warranty Deed from Walter R. Hanson and wife to Thomas W. Banks and wife.

Exhibit 41—Quit Claim Deed from Sarah D. Heard and husband, to Rita L. Banks and Thomas W. Banks.

Exhibit 42—Warranty Deed from Helen M. Richardson to Thomas W. Banks and wife.

Exhibit 43—Warranty Deed from Mary Pearson to Thomas W. Banks and wife.

Exhibit 44—Warranty Deed from William Hosli and wife, to Thomas W. Banks and wife.

Exhibit 45—Warranty Deed from John L. Lewis and wife, to Thomas W. Banks and wife.

Exhibit 46—Warranty Deed from Charles L. Horn to Thomas W. Banks.

Exhibit 47—Deed from the Commercial Investment Company, et al, to Thomas W. Banks and wife.

Exhibit 48—Mortgage from Charles L. Horn to Anne A. Greer.

Exhibit 49—Satisfaction of a Mortgage from the First National Bank of Minneapolis to Charles L. Horn.

Exhibit 50—Assignment of a Mortgage from Stanley M. Lyman to Stanley Mitchell Lyman, Jr., et al.

Exhibit 51—Mortgage from Commercial Investment Company to Stanley M. Lyman.

Exhibit 52—Satisfaction of a Mortgage from Alice L. Harrison, et al, to Commercial Investment Company.

Exhibit 53—Warranty Deed from Hazel Aarhus to Rita Banks.

Exhibit 54—Warranty Deed from Rita Banks and husband to Minnie M. Donahue.

Exhibit 55—Warranty Deed from Will M. Koon to Rita Banks.

Exhibit 56—Warranty Deed from Rita L. Banks and husband to Edmund P. Murphy and Mary Ramona Murphy, husband and wife, as joint tenants.

Exhibit 57—Probate Deed from Dorothy E. Carlson, as Administratrix of the Estate of Jessie McRae Zahn, to Rita L. Banks.

Exhibit 58—Quit Claim Deed from the Village of St. Louis Park to Rita L. Banks.

Exhibit 59—Assignment of a Mortgage from Midland National Bank and Trust Company of Minneapolis, as Trustee to Investors Syndicate Title and Guaranty Company.

Exhibit 60—Assignment of a Mortgage from Investors Syndicate Title and Guaranty Company to Hazel Aarhus, et al.

Exhibit 61—Deed, Crow Wing County, Minnesota.

Exhibit 62—State Assignment Certificate, Crow Wing County, Minnesota.

Exhibit 63—State Assignment Certificate, Crow Wing County, Minnesota.

Exhibit 64—State Assignment Certificate, Crow Wing County, Minnesota.

Exhibit 65—State Assignment Certificate, Crow Wing County, Minnesota.

Exhibit 66—Notice of Lis Pendens, Crow Wing County, Minnesota.

Exhibit 67—Judgment entitled Rita Banks, Plaintiff, versus Allured Bayard Netteleton, et al, Crow Wing County, Minnesota.

Proceedings had May 20, 1952 Exhibits 37 to 67, inclusive, have been offered in evidence. Is there any objection, counsel?

Mr. Graff: Yes, Your Honor. With respect to Exhibits 37 to 67, in compliance with the Court's request, I examined them between the close of the session and the opening of the session today. Insofar as the foundation is concerned, all the exhibits appear to be certified copies of certain documents in County Courthouses. There is no objection insofar as the foundation is concerned. However, the objection runs to the immateriality and the irrelevancy of each and every exhibit, and each and every exhibit from 37 to 67 is objected to on that basis.

The Court: As I remember, the documents are deeds or evidence to title of the property to defendant in this case.

Mr. Graff: Evidence in most part of deeds, Your Honor. In some cases satisfaction of mortgages, some cases Sheriff's deeds, things of that kind, notice of lis pendens, things that would normally be filed in a Register of Deeds Office.

The Court: Well, the exhibits are received.

That is, Exhibits 37 to 67, inclusive, Mr. Reporter.

You may proceed.

WILLIAM A. RIEK called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 5016 Upton Avenue South, Minneapolis, Minnesota and I am 43 years of age. I am an auditor for the Marquette National Bank of Minneapolis and I was subpoenaed to bring certain records to Court. Exhibit 72 consists of original ledger sheets for a checking account in the name of Thomas W. Banks for the period May 23, 1941 to April 26, 1948. Exhibit 72 is offered in evidence.

Cross-Examination as to Exhibit 72

The third sheet of Exhibit 72 includes entries into the year 1951. There is no objection to Exhibit 72 as to any entries subsequent to the year 1947. (Exhibit 72, as marked, is received in evidence.)

Direct Examination Continued

Exhibit 73 is a bank money order drawn on the Marquette National Bank in the amount of $5,400.00 payable to the Walter Lemon Insurance Agency. (Exhibit 73 is received in evidence.)

Exhibit 74 is a bank money order No. 5594 on the Marquette National Bank in the amount of $11,750.00 payable to

the Title Insurance Company as escrow agents and the remitter is Rita L. Banks. Exhibit 75 is a ledger card of the bank covering a loan made to Thomas W. Banks. Exhibit 76 is a record of a collateral deposit to support a loan made at the Marquette National Bank by Thomas W. Banks and the amount of the loan is $2,500.00 and bears the date of May 23, 1941.

(Exhibits 74, 75 and 76 are received in evidence with the right to strike later in the trial.)

No Cross-Examination.

HAROLD H. BANKS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at Lexington, Nebraska and I am 54 years of age and a brother to the defendant in this action. On or about January 31, 1934 I loaned Thomas W. Banks $2,000.00 which was repaid on or about August 2, 1944 and this loan was outstanding during all the intervening period.

MRS. CARRIE E. ANDERSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am Vice-President of the Grand Marais State Bank, Grand Marais, Minnesota. I am 65 years old and live at Grand Marais, Minnesota. Exhibit 77 is the individual or joint and several savings account of Thomas W. Banks and Rita Banks in the Grand Marais State Bank. Exhibit 78 is a savings ledger of our bank covering the account of Thomas W. Banks and Rita Banks, 3817 Drew Avenue South, Minneapolis, Minnesota. The account started on August 31, 1943 and there still is a balance. The last date

shown on Government's Exhibit 78 is May 21, 1952. (Exhibits 77 and 78 are offered and received in evidence.)

WALTER HALVORSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

(Exhibit 79, a duly certified copy of a mortgage from Walter Halvorson to Thomas W. Banks, is offered in evidence and is received in evidence.)

Direct Examination

I live at Grand Marais, Minnesota and I am 48 years of age and am employed by the Cook County Highway Department. I know Thomas W. Banks and I have known him since about 1935. In September, 1943, I borrowed $1,400.00 from Mr. Banks which I paid back at the rate of $25.00 per month except for a period of time when my wife and I were both in the hospital. I completed the payments in 1949. The records of the Grand Marais State Bank reflect the times and the amounts of repayment by me.

Cross-Examination

I made the payments to Mr. Henry Eliason, an attorney in Grand Marais and he desposited them in the bank. I have known Tom Banks since 1935 and he did not charge me any interest on this loan. He sent the money to Mr. Eliason and Mr. Eliason gave it to me.

ALBIN L. LINDMAN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 52 years of age and live at Anoka, Minnesota, and am cashier of the First National Bank at Anoka, Minnesota. Exhibit 80 consisting of nine sheets is from the Commercial Deposit Ledger of the bank for Thomas W. and Rita Banks,

3817 Drew Avenue South, Minneapolis, Minnesota. Exhibit 80 contains the deposits and withdrawals from that account for the period May 15, 1942 through April 20, 1948. Exhibit 81 is a liability ledger of our bank and shows loans made by the bank to Rita Banks and Thomas Banks. The first loan was made on May 15, 1942 and the final repayment was made on November 10, 1943. (Exhibit 80 is received in evidence.)

J. WIMER HAMILTON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 4615 Zenith Avenue South, Minneapolis. I am 44 years of age and I am an accountant with Jamieson Company. Their business is that of stock brokers located in Minneapolis. Exhibit 82 is a check drawn by Jamieson and Company payable to the order of Rita L. Banks in the amount of $24,887.00. (Exhibit 82 is offered in evidence.)

Exhibits 83, 84, 85, 86 and 87 are ledger sheets of Jamieson and Company reflecting the accounts of in some instances Mrs. Rita L. Banks and in some instances Thomas W. Banks, and in some instances Thomas W. Banks and Mrs. Rita Banks. These records show the acquisition of certain stock in Merchants Distillery in 1946 in the name of Rita Banks, care of Simon Meshbesher, 1234 First National Soo Line Building. (Exhibits 83, 84, 85, 86 and 87 are offered in evidence.)

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Hoffmann: Your Honor, as Mr. Landrum, I believe has pointed out this morning, there may be many exhibits offered by the Government during the course of the trial that bear upon years prior to 1945 and subsequent to 1947. It is the contention of the defense that all of such exhibits

are immaterial and any testimony bearing upon those years would be irrelevant and immaterial and not within the triable issues of this case. Some of the exhibits that I now have in my hand I believe pre-date that year and some ante-date that year, 1947. It is our thought that if the Court permitted, the record could note a continuing objection on behalf of the defendant to any such exhibits pre-dating January 1, 1945, and subsequent to December 31, 1947, without our having to take them individually during the course of the trial and repeating them into the record. I am sure it would expedite the entire matter.

The Court: Your objection may stand as to all matters mentioned in this objection or statement made to the Court.

Mr. Hoffman: Then, Your Honor, when the individual exhibit is offered or testimony—

The Court: When the individual exhibit is offered, I will undertake to familiarize myself with it as well as possible. If I think it has some materiality and competency in the case, it will be received. Otherwise it will not be received.

(Exhibits 82 to 87 inclusive are received in evidence.)

Cross-Examination

Any information concerning Exhibits 83 to 87 inclusive is based upon observation of the exhibits rather than upon contact personally with the transactions reflected thereon. Exhibit 83 demonstrates deposit with our firm of 360 shares of Merchants Distillery stock and the sale of such stock in two blocks, 100 and 260 resulting in a credit. The credit of $10,600.62 shown on Exhibit 87 represents a deposit into the account of such amount, but whether the deposit was made in the form of cash or in the form of check cannot be ascertained from this exhibit. Exhibit 84 shows the receipt on October 21, 1946 of Northwest Airline rights in the amount of 750 shares and a deposit by the customer of $6,938.00 for which the customer received 375 shares of stock. Exhibit

86 has as its first entry, December 31, 1947 and shows that the company received from the customer 1,125 shares of Northwest Airlines, Inc. stock. The last entry on Exhibit 85 is dated January 29, 1948, and shows that our company delivered shares of stock to the customer and that closes out the account as far as Exhibit 85 is concerned.

SIMON MESHBESHER called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 56 years of age. I live at 4900 Queen Avenue South, Minneapolis, Minnesota and my occupation is that of a lawyer. My office is located at 1234 First National Soo Line Building. During 1943 I organized a corporation known as the B & S Corporation, and the business address of that corporation was 1234 First National Soo Line Building. I was served with a subpoena duces tecum to produce certain documents and books of the B & S Corporation but I have not brought with me such books and records as they have not been in my possession for a long time. I turned them back to thestockholders and officers some time ago. Harry Shepherd, Thomas Banks and Thomas Ewing are officers of the company. I saw Harry Shepherd about a month ago but I do not know where he is now. I saw Thomas Ewing four to six weeks ago but I do not know where he is now. I do not have in my possession any of the books and records of the B & S Corporation.

CARROLL ANDERSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 4216 Webster Avenue, St. Louis Park, Minnesota and I am 41 years of age. I am an auditor of the First Na-

tional Bank of Minneapolis. Exhibit 88 is the checking account ledger of Rita Banks, 3817 Drew Avenue South, Minneapolis, Minnesota. The first entry is December 29, 1936. There is a running balance as of the end of every transaction in that ledger. The last entry on the last page is June 17, 1948. Exhibit 89 is a ledger card in the name of Mrs. Thomas W. Banks used in the savings department of our bank for savings deposits. The first entry on Exhibit 89 is October 18, 1928 and the last entry is August 1, 1945.

(The following proceedings were had at the Bench, outside the hearing of the jury:)

Mr. Lord: If the Court please, for the record, with reference to Government's Exhibit marked for identification as 89, and Government's Exhibit 90, marked for identification, we propose to bring out by the testimony of this witness that the small balances in these accounts in the amount of $1.03 and $4.85 approximately, remain in the name of Thomas—remained in the name of Reta Banks, and Mrs. Thomas W. Banks, through the period under investigation. However, we, in order to introduce the bank records of this asset, it is necessary to introduce records showing deposits way back as far as 1928 in the instance of Government's Exhibit 90 and 1928 with reference to Government's Exhibit 89. Now, if it would be agreeable with the Court and with counsel, we would have the witness testify as to this continuing obligation, which would preclude the possibility of any prejudice by introducing the prior figures.

The Court: Have you laid foundation for those exhibits?

Mr. Lord: Yes, Your Honor. We have.

The Court: Well, then you can offer them in evidence and announce that you are not interested in entries made prior to a certain date, that they are being offered for the entries made during the date in which you are interested, and you can inquire of this witness if these records show certain

things and let him examine them and he may testify as to the amount on deposit at the beginning of the time and what became of the money and how much there was at the end of the time. There may not be any objection to that. If there is, we will have to rule when the time comes.

Mr. Lord: Thank you, Your Honor.

Mr. Hoffmann: As long as we are up here, may I have these just a moment? I think we will save time. There is objection on the part of the defendant to Government's Exhibits 89 and 90 on all of the grounds heretofore stated, and continuing as a general objection, and upon the particular ground as to these two proposed exhibits that these are accounts of Reta Banks and their materiality and relevancy is not established. But as I understand it, the Court gives us the permission to move that they be stricken from the record if they are not later connected up.

The Court: That may be done. You may proceed.

(Thereupon the following proceedings were had in open court:)

Mr. Lord: Your Honor, at this time the Government offers in evidence Government's Exhibit 89. However, we offer it only insofar as the period of the deposits in this account running from December 31, 1936 through December 31, 1947.

The Court: There is no objection except as has been stated to the Court?

Mr. Hoffmann: That is true, Your Honor.

(Exhibits 89 and 90 are received in evidence.)

The last entry on Exhibit 89 is August 1, 1945, in the amount of three cents. The next preceding entry in time and in amount was on August 7, 1944 in the amount of $1.00. The amount of $6.09 is still owing to Mrs. Banks by the bank

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as of December 31, 1947. Exhibit 91 is a check dated May 8, 1946 of the First National Bank payable to Rita L. Banks in the amount of $10,600.62 endorsed by Rita L. Banks Exhibit 92 is a cashier's check of the First National Bank dated May 8, 1946 payable to the order of Mrs. Rita L. Banks in the sum of $2,994.38. Exhibit 92 is endorsed Mrs. Rita Banks and E. A. Jeffords. Exhibit 93 is a cashier's check drawn on the First National Bank dated April 5, 1946 payable to the order of Thomas W. Banks in the sum of $11,034.50. Exhibit 94 is a form used by the bank bearing date May 8, 1946 and the name Mrs. Rita L. Banks, not bearing a date at the usual place and is a form used by the bank for the recording of bonds being redeemed at the bank. There is no way in which I can determine the date of Government's Exhibit 95.

Cross-Examination

Exhibit 88 is objected to subject to all of the objections noted in the record and the further objection in particular because of it being an account in the name of Rita Banks. Exhibit 88, is received by the Court. (There is no objection to Exhibit 92 and Exhibit 92 is received by the Court.)

The proceedings representing the redemption of the bonds as evidenced by Government's Exhibit 94 were submitted to the person entitled to such proceedings by cashier's check. There would be supporting entries in the books of the bank covering the issuance of the check itself. I did not look for any such entries. What has been said with respect to Exhibit 94 prevails with respect to Exhibit 95. (Exhibits 94 and 95 are received in evidence.)

Exhibits 91 and 93, being two cashier's checks, representing the transmittal of the proceeds to the customer of the redemption of the bonds represented by Government's Exhibits 94 and 95. (Exhibits 91 and 93 are received in evidence.)

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Mr. Lord: We offer in evidence:

Exhibit 96—Certified photostatic copy of bond record dated May 16, 1952.

Exhibit 97—Certified photostatic copies of redeemed bonds bearing date of March 16, 1952.

Exhibit 98—Photostatic copies of bonds bearing date May 5, 1952.

(Exhibits 96, 97 and 98 are received in evidence subject to a motion to strike.)

STANLEY M. LYMAN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 59 years of age and live at Wayzata, Minnesota. I am engaged in the real estate business at 642 McKnight Building. Exhibit 99 is a mortgage record card which I keep in my office to record mortgages, dates of payments, etc. Exhibit 99 pertains to the so-called Oneida Building in Minneapolis. (Exhibit 99 is received in evidence.)

Cross-Examination

Exhibit 99 shows the original entry and shows the payments as they are made monthly. The last transaction is November 6, 1947 and it shows that it was paid in full on November 7, 1947. It shows that a mortgage was made on June 5, 1942 in the amount of $7,500.00 and the payment and satisfaction of it are demonstrated by the three cards representing Exhibit 99.

STANLEY J. TOMAN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination.

I am 57 years of age and live at 9600 Normandale, Minne-

apolis, Minnesota. I am assistant secretary of the McKnight Company, and building manager of the McKnight Building. Exhit 100 is the cash receipt and check register of the S. T. Mcknight Company. Exhibit 100 demonstrates the cash received from various sources. (Exhibit 100 is offered in evidence.)

Mr. Lord: The offer in evidence of Government's Exhibit 100 is made only insofar as it reflects an entry in these books on a page which is not numbered but which entry bears the date May 14, 1946, and is entry number — it is on the page beginning May 14, correction, and it bears the date May 27th and the name Harry Clark, and with the figures and notations thereafter set out.

(Exhibit handed to Mr. Hoffmann.)

Mr. Hoffmann: Perhaps if I might so suggest to not burden the Clerk and the record, if counsel for the Government would state what they want from this book, we might agree that the book so shows and this big book need not be received.

Mr. Lord: It is our request that the book be offered in evidence insofar as this page is concerned.

The Court: Well, offer it in evidence if you want it in evidence.

Mr. Lord: I have offered it in evidence.

The Court: Has it been offered?

Mr. Lord: Yes, Your Honor.

The Court: Any objection?

Mr. Hoffmann: Well, we have no way of knowing, Your Honor, from the entry in this book, which is a book of someone else, how this matter under the name of another individual pertains to this case or to this defendant. Its materiality certainly is not demonstrated fo rthe purpose of our

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passing upon the admissibility in the way of any objection or admission. We have no way of knowing what this refers to.

The Court: You may proceed to ask this witness about these entries that you want in evidence in this case.

Mr. Lord: Yes, Your Honor. If the Court please, I believe there are already exhibits in evidenc which will give materiality to this particular entry.

The Court: If you want the entres in that book in evidence, find out what they are.

Q. (By Mr. Lord.) I ask you, Mr. Toman, what is reflected by the entry as to the name of Harry Clark, bearing the date May 27, 1946?

A. The amount shown after H. Harvey Clark, — there are two amounts, $4,000.00 and $1,000.00.

Q. And what do they reflect?

A. The $4,000.00 is indicated as currency.

Q. And the $1,000.00?

A. The $1,000.00 as a check.

Q. And do you have any other entries after that name?

A. We have the entries showing "Contract for sale of real estate."

Q. And what is after that?

A. The sum of $5,000.00, representing earnest money payment.

Q. Do you have another entry in this book reflecting payment from Mr. Clark:

A. We do.

Q. And is that on the following page, bearing the date of June, 1946, and the 13th day thereof?

A. That is right, sir.

Q. And what is that entry?

A. It shows cash, $3,000.00, a Marquette National Bank check of the Sons of Norway to H. Harvey Clark and Thomas W. Banks, one for $11,500.00, the other for $22,500.00.

Q. What is the entry on the extreme right of that line?

A. It shows a credit to real estate number 51, known as 224 South Tenth Street.

Q. In what amount?

A. In the sum of $37,000.00.

Mr. Lord: Your Honor, at this time, I offer in evidence those pages of Government's Exhibit 100, which have been quoted from by the witness. If the Court please, I will request that the Clerk mark those pages as 100-A and 100-B.

The Court: I did not get the purpose of that $37,000.00 entry.

The Witness: Final payment of that transaction — final payment for the real estate.

The Court: Final payment for the real estate?

The Witness: That is right.

The Court: That was involved in the transaction ?

The Witness: That is right, sir.

The Court: Very well.

Exhibit 102 is an earnest money contract running from T. S. McKnight Company to H. Harvey Clark and that refers to the real estate mentioned in Government's Exhibit 100.

(Exhibit 102 is offered in evidence.)

Exhibit 101 is a journal of the S. T. McKnight Company for the period April, 1946 to December, 1947. Page No. 50 is marked Government's Exhibit 101-A which contains several journal entries. The top entry on Exhibit 101-A transfers some real estate into contract for sale of real estate as of May 27, 1946, real estate property numbered 51 covering property at 224 South Tenth Street. Forty-two Thousand Dollars represents the consideration in the earnest money

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contract for sale. The next entry is depreciation which covers the period from the date the McKnight Company acquired the property to the date of sale. The next entry is the loss on the sale of real estate which is $8,667.20. The next entry is a credit to real estate in the amount of $55,000.00 and that describes the real estate at 224 South Tenth Street and the purchaser of the property is H. Harvey Clark. None of the other entries on that page have reference to this property.

(Exhibits numbered 100, 100-A, 100-B, 101 and 102 are received in evidence.)

Cross-Examination

Some of the figures which have been read from Exhibit 100-A have no reference to the sale of this property except for the purposes at the McKnight Company. The McKnight Company had a cost of $55,000.00 for the building and the entries that were made for depreciation cost were made for capital gain or capital loss purposes. The sole consideration for the purchase of the building is represented by the earnest money contract for the sale of real estate which is marked Exhibit 102 betwen H. Harvey Clark and the McKnight Company which contract is dated April 10, 1946 and also for $42,000.00. Exhibits 101-A and 100-B show the receipt by the McKnight Company of $42,000.00. On May 27th the total purchase price paid by H. Harvey Clark for this property was $42,000.00. The reference to the $55,000.00 was for the McKnight Company's own tax purposes.

ANNE B. FREDLUND called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 43 years of age and live at 4300 Aldrich Avenue South, Minneapolis. I am a bookkeeper for the Ring Construction Company located at 721 Metropolitan Building,

Minneapolis. I have worked there since February 18th of this year.

Exhibit 103 is a ledger card under the name of Thomas Banks. Exhibit 103 is an accounts receivable sheet of our company under the name of Thomos Banks. Exhibit 104 is an account in our records in the name of Thomas Banks, 3817 Drew Avenue South.

(Exhibits 103 and 104 are offered and received in evidence.)

The entry on Exhibit 103 as of December 31, 1947 was a year end entry bringing forward a credit balance on Thomas Banks' residence account of $2,000.00. Mr. Banks had forwarded a check to the Ring Construction Company on account of work, labor and material that we were performing at his residence at 3817 Drew Avenue South. On Exhibit 104 on page 20 a charge was made to Thomas Banks' residence for labor and material in the amount of $5,247.77. I cannot tell from looking at these exhibits how much was charged against Mr. Banks for work done up to and including December 31, 1947. On a small project of this type, the billing is made at the date of completion.

Cross-Examination

My testimony with respect to Exhibit 103 is based on the regular procedure at the Ring Construction Company of bringing forward balances. Exhibit 103 simply shows that on November 19, 1947 a deposit of $2,000.00 was credited to the account of Thomas Banks' residence at 3817 Drew Avenue South. Exhibit 103 was closed out on December 31, 1947 and the credit remaining in the account of $2,000.00 was posted on Exhibit 104 as a credit under date of February 20, 1948 and the account was carried on from there. The account reflected by Exhibit 104 was closed out on December 15, 1948. Nothing on the exhibit demonstrates when the work was completed.

ERNEST G. HAGBERG called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 62 years of age and live at 3715 Pleasant Avenue, Minneapolis. I am the collection manager for the Department of Rural Credits, State of Minnesota. Exhibit 105 is a mortgage given to the State of Minnesota, Department of Rural Credit on July 17, 1924, by Erick Pearson and Mary Pearson, his wife covering the Southwest Quarter of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter, in Government lots numbered Two and Three of Section Eleven, Township One Hundred Twenty North, Range Twenty-two West, Hennepin County. On the second full page of Exhibit 105 an item reads "This Agreement to Assume Mortgage was signed by Thomas W. Banks and Rita L. Banks, husband and wife, as joint tenants and not as tenants in common, on September 20, 1939." Exhibit 106 is our permaent ledger card records of all payments made on the mortgage. (Exhibits 105 and 106 are offered in evidence and are received.)

Exhibit 107 is a statement prepared at the time that the assumption agreement or the mortgage is assumed by Mr. Banks. The first figure on the top thereof is the amount that was shown on our ledger card as the amount still owing on the mortgage at the time that the mortgage was assumed by Mr. Banks and his wife which amount is $4,704.45. Exhibit 107 more clearly reflects the balances due and the payments thereon than Government's Exhibit 106.

(Exhibit 107 is offered and received in evidence.)

Cross-Examination

Exhibit 107 was mailed out on September 18, 1950. The loan in this matter was paid in full on July 24, 1944, and the release of the mortgage and other papers were mailed to Thomas W. Banks on August 3, 1944.

FREDERICK J. WICKERS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 47 years of age and live at 2483 North Snelling, Saint Paul, Minnesota. I am the President of the Power Brake and Equipment Company. Exhibit 108 is a check drawn on the Power Brake and Equipment Company payable to the order of F. J. Wickers in the amount of $1,250.00 and bearing date of August 21, 1947. I signed the check and I also endorsed it. It also bears the endorsement of Rita Banks. Exhibit 109 is a check drawn by the Power Brake and Equipment Company on September 26, 1947 to the order of F. J. Wickers in the sum of $1,362.50. I have signed the check and also have endorsed it and it also bears the endorsement of Rita Banks. The amount of Exhibits 108 and 109 represent the repayment of a loan received from Rita Banks.

(Exhibits 108 and 109 are offered and received in evidence.)

The loan from Mrs. Banks represented by this repayment was made in 1946 and the amount of the original loan was $2,500.00 and the checks represent repayment with interest. Exhibit 110 represents corporate records of the Power Brake and Equipment Company and includes the record of stock ownership. Stock Certificate No. 2 in the Power Brake and Equipment Company was issued in the name of T. W. Banks for 37½ shares.

(Exhibit 110 is offered and received in evidence.)

Mr. Weinstock does the accounting for the Power Brake and Equipment Company. Exhibit 111 is the general ledger of the Power Brake and Equipment Company.

(Exhibit 111 is offered and received in evidence.)

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The money I borrowed from Mrs. Banks was a personal loan and I endorsed the checks and turned them over to her in repayment of the loan. I drew the money out of my equity in the Company to repay the loan. The books of the corporation reflect the transaction. Exhibit 112 is a check drawn by the Power Brake and Equipment Company on March 12, 1948, payable to F. J. Wickers in the amount of $4,680.00 which check was signed by me. This check represents repayment of a loan made by me to the Company. I borrowed the money from Mr. Banks to make that loan to the Company. The books of the corporation would reflect the date that the loan was made from me to the corporation. I had the money approximately one year that I borrowed from Tom Banks, the payment of which is represented by Exhibit 112. I borrowed $4,500.00 from Mr. Banks and the $180.00 would represent interest.

(Exhibit 112 is offered and received in evidence.)

Exhibit 112 bears my endorsement and my father's endorsement. My father cashed the check for me at the bank and gave the money to me. I believe I gave the money to Mrs. Banks but it represented a loan from Mr. Banks and the loan was repaid on approximately the date of the check, March 12, 1948.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 22, 1952. Appearances are as has been heretofore noted.

CHRISTIAN J. RATHMANN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 1712 Hampshire, St. Paul, Minnesota. I am office manager of the Twin City Milk Producers Association whose address is 2424 Territorial Road. Exhibit No. 113

is a stockholder's record of a contract numbered 4832 for three shares of stock of the Twin City Milk Producers Association. Exhibit 113 shows the date of signing the contract to be February 17, 1942 and the next three entries show the dates that each share of stock was paid in full, namely: February 28, 1942, September 30, 1942 and April 30, 1943. The acquisition value of each share of stock is $55.00 making a total amount of $165.00. (Exhibit 113 is offered and received in evidence.)

Cross Examination

The value of $55.00 per share was actually fixed on August 1, 1936 and has been the same ever since. It is book value and not necessarily market value.

RENE J. DUFOURD called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 5020 South Second Avenue, Minneapolis, and have lived there 13 years. I am married and I live at this address with my family. I am office manager for the Prudential Insurance Company, Mortgage Loan Department located at 200 LaSalle Building in Minneapolis.

Exhibit 114 is a mortgagors record card for Rita Banks and Thomas W. Banks and Oscar Carlson covering property located at 3952 Beard Avenue South. Exhibit 114 shows the balance on any given date on the mortgage and shows the dates and amounts of payment. (Exhibit 114 is offered and received in evidence.)

Exhibit 115 is drawn from the data in Exhibit 114 and reflects the balances due and owing on that account as shown by our books on December 31, 1941, 1942, 1943 and 1944. (Exhibit 115 offered and received.)

Cross-Examination

The mortgage was paid in full on August 22, 1944. I do not know what interest Oscar Carlson had in the property but an application listed Oscar Carlson as a previous owner.

MORLAN H. BISHOP called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 4503 Wooddale, Minneapolis, Minnesota, and have lived there five years. I am a securities dealer buying and selling stocks and bonds and my business is located at 1660 Northwestern Bank Building, Minneapolis. Exhibit 116 is a journal dated March, 1945 of my business. (Only that portion of the exhibit which pertains to Mr. Banks is offered in evidence and the exhibit insofar as it relates to transactions with the defendant is received in evidence.)

Exhibit 116 B is a record of purchases made by customers of our business and there is an account in the name of Thomas W. Banks. (Exhibit 117 is offered insofar as it relates to transactions of the defendant, and that portion relating to the transactions of the defendant is received in evidence.)

On exhibit 116 B the figure "400" means 400 shares and the description is Northwest Airlines common stock and "WW" means with warrants. Warrants are the right to purchase additional stock. "32¼" means that the price was $32.25. 400 shares of Northwest Airlines stock at $32.25 per share, makes a total of $12,900.00. To that was added postage and the service charge of 95 cents and a commission of $82.24 making a total of $13,023.19. The amount $13,023.19 is the amount which Mr. Banks paid our company to receive delivery of the shares. There is a second transaction by Thomas W. Banks which consists of 100 shares of Northwest Airlines common stock with warrants at a price

of $32.00 per share, making a total of $3200.00 to which was added postage of 60 cents, a commission of $20.50, making a total of $3,231.10. The date of that transaction was March 22, 1945 and the $3,231.10 represents the final figure which Mr. Banks paid our company in order to acquire this stock. On Exhibit 117 the entry on the third line in the name of Thomas W. Banks represents the purchase on April 9, 1945 of 250 shares of Northwest Airlines stock at $23.00 per share, making a total of $5,750.00 to which was added $15.00 brokerage, making a total of $5,765.00.

J. HOMER THOMPSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 4260 Utica, St. Louis Park and have lived there three years. I am the assistant cashier of the First Hennepin State Bank, Minneapolis, Minnesota. Exhibits 118 through 118 R are collateral records of the bank of loans made on liquor in warehouses to the Casablanca, Incorporated at 408 Hennepin Avenue. We had warehouse receipts on the liquor which amounted to a mortgage and the liquor could not be released until the warehouse receipt was surrendered. Exhibit 118 S is a collateral record of the bank that shows a combination of other collateral records and it reflects the changes as the liquor is drawn out so that it conforms at all times with the amount of liquor left in the warehouse. Exhibit 118 T is the liability record of the bank which shows the loan as well as any reduction or additional loan. Exhibit 118 U and 118 V are continuation sheets of 118 T.

Exhibits 118 A to V represent loans made and secured by warehouse receipts on liquor. The general procedure is for the party who wants to make the loan to submit the list of warehouse receipts and the bank then decides whether

they wish to loan 80% or 75% on the liquor. If the borrower wishes to get any of the liquor for their establishment, they tell the bank what they want and we, in turn, figure the cost of the liquor at the price it was quoted to us and they only have to pay the 80% or 75% whichever the loan was secured by to get the liquor released. At that time we make up warehouse releases and give one to the borrower, mail one to the warehouse and keep one for our records. In this instance Casablanca Cafe had borrowed money on liquor and we took warehouse receipts for liquor held in the name of the Casablanca Cafe. Exhibits 118, 118A through 118 V show the final date on which the transaction was concluded. On the final date it shows that there was some liquor still pledged to the bank. The value of the liquor being $31,088.80 as of February 20, 1947. Exhibit 119 represents two inventories, one from the Colonial Warehouse and one from the Northwest Warehouse. It inventories all the liquor they had in the warehouse on December 29, 1946 in connection with this loan. Exhibit 120 is the liability card kept on a liquor loan to the Shanghai Cafe at 408 Hennepin Avenue from its origination February 20, 1947 until it was closed out September 21, 1948. Exhibit 120 along with Exhibit 125 shows that this loan was made on part of the liquor of the Casablanca Cafe. Exhibit 121 is a collateral record that we keep of the warehouse receipts showing each brand of liquor separately and that shows that we loaned money to the Shanghai Cafe. It shows the withdrawals of liquor per case but it does not show the separate payments. Exhibit 122 is a duplicate of Exhibit 121 with the exception that the price of liquor is figures at the market price.

Exhibit 122 is more of an informative record that we keep for ourselves. Exhibit 123 is a collateral record of liquor kept in the Northwest Warehouse on which loans were made to the Shanghai Cafe. It is a record of the value of the liquor as of the date shown on each line. Exhibit 124 is the same record as Exhibit 123 with the exception that the value of the liquor is given at the invoice price. Exhibit 126 is a

separate collateral record that we keep of the same transactions showing the origination date and the release date of the whole transaction. Exhibit 125 is a comment sheet. (Exhibits 119 through 126 are offered in evidence.)

As of February 20, 1947 there was $31,000.00 loaned by our bank, secured by liquor and the liquor inventory in warehouses to secure this loan was near 20 per cent greater than the $31,000.00. Exhibit 125 states the disposition which was made of the liquor.

Mr. Graff: If the Court please, I have examined Exhibit 125. Exhibit 125 differs from the other exhibits which I have just glanced at. Now, counsel has laid the foundation for these exhibits under the so-called "Federal Shop Book" rule which covers records made in the usual course of business. I would like to direct attention to Exhibit 125, which consists of a self-serving statement and is not a machine or a record that normally would be made, and we object to the introduction of that exhibit into evidence at this time.

The Court: Mr. Thompson, was Exhibit 125 made in connection with this loan?

The Witness: Yes, sir.

The Court: It was customary for your bank to make such records as Exhibit 125?

The Witness: We make a comment such as this on every loan made in the bank with the exception of installment loans.

The Court: It was made about the time of the date of it?

The Witness: Yes, sir.

The Court: The exhibit is received.

(Exhibits 118 to 126 are received in evidence.)

The loan made to the Shanghai Cafe was in the amount of $16,457.96. It was a 90-day loan secured by non-negotia-

ble warehouse receipts on liquor. The loan was made on the basis of 80 per cent of the original invoice cost of the liquor amounting to $21,075.00. It also states that on that same day the liquor was valued at $25,798.00. The loan was made on the portion of the liquor that the Shanghai Cafe kept for themselves upon the purchase of the Casablanca Cafe. Exhibit 118 does not show the exact proportion of the liquor that was transferred to the Shanghai Cafe. Exhibits 118, 118 A through 118 V show the transactions on the business records of our bank concerning the liquor and the payments thereof insofar as the Casablanca Bar and Cafe are concerned. Exhibits 120 through 126 show all the withdrawals and additions down to the final date when the balance was paid off on September 21, 1948.

Exhibit 144 is a comment sheet on liquor on which a loan was made on warehouse receipts and the entries thereon were made by the bank in the regular course of its business and it was the regular course of the business of the bank to make the entries on or about the date they bear. (Exhibit 144 is offered in evidence.)

Exhibit 134 is an inventory on liquor held in the Northwest Warehouse and the owner is shown to be one Harold Asp doing business as Harold's Liquor Store. The second sheet attached to the exhibit is an assignment written on bank stationery, dated February 19, 1947 assigning the liquor to Harold R. Asp, doing business as Harold's Liquor Store signed by William Donnelly by Leonard H. Weinstock, attorney in fact. Exhibit 135 is a liability record of the bank in connection with a loan made to Harold's Liquor Store on February 20, 1947, on warehouse receipts on liquor. Exhibit 136 is a collateral record of the bank in connection with the same loan to Harold's Liquor Store. Exhibits 137 to 143 inclusive are essentially reflections of the same transaction of the loan to Harold Asp, doing business as Harold's Liquor Store. These exhibits originally list the warehouse

receipt number with each brand of liquor and also lists the withdrawals, by brand and by case, as they are made.

Exhibit 145 is a power of attorney running from William Donnelly to Leonard H. Weinstock and is dated February 11, 1947. (Exhibits 127 to 146 are offered in evidence.)

Exhibits 127, 128 and 129 reflect the loan of certain money on liquor stock and the repayment thereon, the loan being made by McCarthy's St. Louis Park Cafe. Exhibit 130 is a bill of sale from the Shanghai Cafe and Paradise Bar to McCarthy's St. Louis Park Cafe being dated September 9, 1948. Exhibit 132 is a bill of sale from Lillian Hollen to McCarthy's St. Louis Park Cafe. Exhibit 131 is the appointment of Archie M. Cary as attorney, by one James W. Toung. The liquor that was in storage was gotten out of storage by paying the bank the amount which we had loaned on the liquor. In the case of the Shanghai Cafe 100 per cent of the invoice price was paid to us to release the liquor but we had loaned only 80 per cent on the liquor. We received a 20 per cent value in addition to the amount of the loan on the liquor. Whenever liquor was released from the warehouse and paid for by the borrower, we kept a record showing the amount of liquor taken out and what it cost. We have a record of what happened to the excess over the actual invoice cost of the liquor.

Exhibits 117, 117 A to 117 Z-1 to 117 Z-34½ and 117 Z-35 to 117 Z-88 except 117 Z-37 represent the over payment over and above the 80 per cent loan out to the Shanghai Cafe at the time that they took the liquor out which is the other 20 per cent and these exhibits represent cashier's checks drawn upon our bank. Exhibit 117 Z-37 is a cashier's check drawn upon our bank dated February 19, 1947 made payable to the order of the Shanghai Cafe and Harold Asp doing business as Harold's Liquor Store in the amount of $4,406.89. I cannot definitely say the purpose for which Exhibit 117 Z-37 was used, but I do know the purpose for which

the other checks in Exhibit 117 were used. (Exhibits 117 through 117 Z-88 are offered in evidence.)

The Casablanca had the original loan with our bank. On or about February 20, 1947 they sold out to the Shanghai Cafe. The Shanghai Cafe intended to stress their food service more than the liquor end of it and they did not want to take over the entire stock of the Casablanca Cafe so they took part of the stock that they wanted and borrowed from us on the 80 per cent of the invoice value. They sold the remaining stock to Harold's Liquor Store and I believe he had the same arrangement, 80 per cent on that part of the liquor that he took from the Shanghai Cafe. The arrangement was made whereby they would pay back 100 per cent to the bank at the time the liquor was released. We would apply 80 per cent on the loan, reducing the amount of our loan in that amount. The other 20 per cent was to go to the former owners of the Casablanca Cafe in the form of cashier's check held in our collection file until they were picked up.

In order to get the liquor released it was necessary to pay us to reduce the amount of the loan with the exception of McCarthy's who did not enter in the same kind of a picture. The extra 20 per cent was paid to William Donnelly.

Exhibit 144 will explain why the checks were made out in the name of William Donnelly. Our bank records showed that William Donnelly was doing business as the Casablanca Cafe. The original liquor stock and the original obligation shown by these exhibits were in the hands of William Donnelly doing business as the Casablanca Cafe and I assume that as distinguished from Casablanca Cafe, Incorporated, meant William Donnelly. When the additional 20 per cent over the value of the liquor and our loan was made, it would be made to William Donnelly by the cashier's checks which have been introduced in evidence.

Mr. Graff: Now, if the Court please, with respect to Exhibits 118 to 118-V, these exhibits are not objected to on the ground of foundation. They are objected to on the ground that they are immaterial to the issues involved in this lawsuit, and if it should be stated that these will be connected up later, I would prefer that counsel make an offer of proof so that we would know what the relevancy of these particular exhibits might be.

The Court: The exhibits have been received, according to my notation.

Mr. Graff: I understood it was subject to my right upon examination to—

The Court: Very well, your objection is overruled.

Mr. Landrum: Are they received now, then, Your Honor?

The Court: They are received. If they have not been received, they are now.

Mr. Graff: Now, if the Court please, with respect to Exhibits 119 to 124, and then Exhibit 126, it appears that all of those exhibits pertain to the Shanghai Cafe and they are objected to on the ground that they are immaterial and irrelevant to the issues involved in this case.

The Court: The objection is overruled.

Mr. Landrum: They are in evidence, then, Your Honor?

The Court: They are in evidence.

Mr. Graff: If the Court please, with respect to the exhibits 134 to and including 143, objection is made, first of all, that the exhibits are incompetent and irrelevant to the issues involved in this action, because this witness has identified them as applying to Harold's Liquor Store, and secondly on the ground that the first transaction reflected in these

exhibits begins on February 20, 1947 and continues until sometime into 1950. Consequently, we do not feel that they are material to the triable issues in this case.

There is no objection, Your Honor, to the foundation for the exhibits.

The Court: Very well, the exhibits are received. Those are Exhibits 134 to 143, inclusive, Mr. Reporter.

Mr. Graff: Objection is made to Exhibits 127 to 132, inclusive, on the ground that they are immaterial to the issues involved in this action, it appearing that they all happened after December 31, 1947, and there has been no showing here that they have or are within the triable issues involved in this case.

The Court: The objection is overruled. The exhibits are received.

Mr. Graff: At this time, if the Court please, objection is made to Exhibits 117 and 117-A to Z, and 117-Z-1 to 34½, and 117-Z-35 to Z-88, on the ground that the checks represented thereby are incompetent and irrelevant to the issues involved in this action.

The Court: The objections are overruled. The exhibits are received.

Mr. Graff: With respect to Exhibit 145, Your Honor, there is no objection.

The Court: Very well. The exhibit is received.

Mr. Graff: With respect to Exhibits 125, 133, and 144, I wish to make this objection. I think I objected to 125 this morning on the ground that that exhibit was not a record which was customarily and ordinarily kept in the bank's business as is contemplated by the Federal Shop Book Rule, and I make the same objection now as to all three of these exhibits, namely, 125, 133, and 145, and would like to direct

the Court's attention to the case of Palmer vs. Hoffman, reported in 318 United States, 109, in which the Federal Shop Book Rule is interpreted by the Court and in connection with the interpretation of that statute, I would like also to direct the Court's attention to the cases of Schmeller vs. The United States, 143 Fed. 2nd, 544, New York Life Insurance Company vs. Taylor, 147 Fed. 2nd, 297. I think these cases, Your Honor, make it abundantly clear that the so-called "Shop Book Rule" was designed solely to facilitate the admission of records which experience had shown to be trustworthy and does not include records such as the recording of statements. I am reasonably sure the Court is familiar with those cases and objection is made to those three exhibits on that ground, and on the ground, of course, that they are hearsay.

The Court: I think on the foundation laid for these exhibits, that the objection should be overruled. It is overruled, and the exhibits are received.

There was an understanding with the Hennepin State Bank that the Shanghai Cafe was to pay 100 per cent of the invoice value of the merchandise and that the bank would apply 80 per cent on the loan and then 20 per cent would be held and later transmitted to Mr. Donnelly. I could not answer you one way or another definitely whether there was a written agreement in the bank. The bank would have to be satisfied that Mr. Donnelly was to receive the equity amounting to 20 per cent, otherwise the bank would not have issued these cashier's check to him.

Re-Direct Examination

I will undertake to bring to court the check register which has been asked about on cross-examination to show who furnished the money or other funds for the checks represented by Exhibit 117.

BEN R. TOENSING was called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at Route 1, Hopkins, Eden Prairie Township with my family. I am 57 years of age and am an attorney admitted to practice law. I have been practicing law since 1922 and I office at 415 Minnesota Federal Building, Minneapolis together with five other lawyers. I was subpoenaed to bring certain books and records to court and I have brought all that I could find. I was appointed Secretary of the Flour City Body Corporation and I have brought with me the records which were supplied to me by the corporation. The president is Mr. A. M. Cary and he has an office in the same suite that I have. Exhibit 146 is a record of the Flour City Body Corporation containing stock certificates and stock stubs. The Flour City Body Corporation is located on 29th and Blaisdell. Exhibit 147 represents the corporate minute book and by-laws and other entries of the Flour City Body Corporation. Exhibits 148 and 149 are also books of the Flour City Body Corporation. I do not know who does the accounting work for the Flour City Body Corporation and I have been the secretary since February 11th. I have brought what I understand is the accounts receivable ledger of the corporation. I will do whatever I can with respect to the other records of the corporation. The business is in liquidation and they are moving and they have to vacate by the end of this month. What can be found will be produced if it is not here.

LAURENCE FRANCIS CONNOLLY called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at Garrison, Minnesota and I am a manager of the Blue Goose Corporation, a resort. I am the vice-president of the corporation. I do not know where the business office of the corporation is but I know that they operate a resort at Garrison, Minnesota. I was served with a subpoena to bring to court certain books and records of the Blue Goose resort. In answer to your question as to whether I brought a check No. 5139 payable to the order of Rita Banks, my answer is that I do not know as I gave the subpoena to the auditor and showed him what I wanted. Whether it is in these envelopes I can not say. By the auditor I mean, Mr. Weinstock. I believe the books are kept in Mr. Weinstock's office but I did not bring them from Mr. Weinstock's office. The books were brought here for me. To the best of my knowledge I have brought all of the books and records of the Blue Goose corporation. Exhibits 150, 151, 152 and 153 are the record books of the Blue Goose corporation. (Exhibits 150, 151, 152 and 153 are offered in evidence.

JEREMIAH J. MURPHY called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

I live at 2724 Quenton Avenue, St. Louis Park with my family. I am the general manager of McCarthy's Cafe located at 5600 Wayzata Boulevard, St. Louis Park. I was recently served with a subpoena requesting me to bring certain books and records of the corporation to court. Exhibits 154, 155, 156, 157, 158, 159 and 160 are records of McCarthy's St. Louis Park Cafe Incorporated. Entries in these books will be made by the bookkeeper or the auditor. The auditor

is Mr. Weinstock. (Exhibits 154 to 160 are offered in evidence.)

CHARLES L. HORN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

I live at Minneapolis and my occupation is that of a manufacturer. In 1939 I owned a piece of property known as the Southwest one-fourth of the Southwest one-fourth of Section 14, Township 32, Range 24, Anoka County, Minnesota. I received this property in trade from Thomas W. Banks and the property that I traded to him is described as Lots 12 and 13 and the North thirty (30) feet of Lot 14, Block 2, Dorman's First Addition to Minneapolis, which property is commonly known as 4400 East Lake Street, Minneapolis, Minnesota. My auditor keeps books reflecting transactions in which I may have been engaged. I have a regular journal covering transactions in which I engaged, which is in the hands of the accountant who handles my records.

RAY MCKENNAN called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am 62 years of age and I am a certified public accountant sometimes employed by Charles L. Horn. I keep a record of the various transactions in which Mr. Horn is engaged. I have occasion to make certain entries in journals for Mr. Horn. At the time that I made the journal entries I believe I had documents which substantiate the figures that are shown. I do not remember whether there was a written contract for the transaction representing the exchange of property by Mr. Horn and Mrs. Banks. Exhibit 161 is a transcript of certain entries shown in the books of Charles L. Horn.

Cross-Examination

Exhibit 161 is a transcript of journal entries in some books of original entry kept by Mr. Horn. I do not have the books of original entry with me.

CHARLES L. HORN called as a witness on behalf of the United States, being first duly sworn, further testified as follows:

Direct Examination

Mr. Banks and I did not have any discussion with reference to the value of the property that we traded. I did not arrive at any value as to the property which I obtained in Anoka County. The entire transaction took place through Mr. Brancheau, who is the man selling and trading the property. He and I are the ones that signed the contract for deed and arrived at the values. I do not have a contract showing this transaction but I understand Mr. Brancheau has.

FRANK A. NEUNSINGER called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct Examination

I live at 4833 Zenith South, Minneapolis and I am employed as a closer of loans and sales at the First National Bank of Minneapolis. In the course of my business I had occasion to handle a loan involving the property at 4400 East Lake Street, Minneapolis. The First National Bank was appointed as trustee or executor of the estate of Anna A. Greer on February 11, 1946. Included in the assets of the estate was a mortgage of a piece of property located at 4401 East Lake Street known as Lots 12, 13 and 14, Dorman's First Addition to Minneapolis, Hennepin County. Exhibit 162 is the mortgage record card at 4401 East Lake Street. This exhibit shows the original amount, the amount at the time it was introduced as an asset in the estate, in the

amount of $1700.00 with the interest paid to September 1, 1945 and other details in conjunction with the mortgage papers. The original mortgage was made to Charles L. Horn and was assumed by Thomas W. Banks but I do not have the information or the date, but it was prior to the date the estate was admitted to probate. We were appointed executor of Mrs. Greer's estate on February 11, 1946 and the estate was admitted to probate some time prior to that. Exhibit 163 is a receipt of papers delivered to the agent at the time of satisfying the mortgage. (Exhibits 162 and 163 are offered and received in evidence.)

Cross-Examination

The original mortgage was in the sum of $2200.00 and was made by Mr. Horn as borrower, to Anna Greer as lender on March 1, 1929. Anna Greer, the mortgagee, died and we were appointed executor of her estate in February, 1946 and at that time there was a balance of $1700.00 owing on the mortgage which balance was paid in full on April 11, 1946.

ROBERT E. MYERS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 2900 West 41st Street, Minneapolis and I work for the Northwestern Federal Savings and Loan Association as secretary. Their place of business is at 823 Marquette Avenue, Minneapolis. Exhibit 165 is a mortgage record card indicating the original amount, the payments made thereon, and the interest charged on a mortgage made by Thomas W. Banks and his wife covering property at 5238 Excelsior Boulevard, St. Louis Park. Exhibit 164 is a record made in conjunction with this loan of the disbursements made thereon in connection with the remodeling and charges in connection with the loan.

(Exhibits 164 and 165 are offered and received in evidence.)

According to Exhibit 165 the first entry is August 31, 1942, when a loan of $6,000.00 was made. Subsequent entries show the amounts and dates of repayment of that loan. Final payment of this loan was made on October 16, 1944. The $6,000.00 is a credit advanced to Mr. Banks and the subsequent entries show the disbursements of those portions of the $6,000.00 which went toward the improvement of the property at 5238 Excelsior Boulevard. On Exhibit 164 it shows a check issued December 5, 1942 to Thomas W. Banks for $1,876.79.

DONALD C. MELBYE called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 2190 Scheffer, St. Paul, Minnesota, with my family. I work at the Federal Land Bank of St. Paul as an accountant and supervisor of the individual mortgagors' and purchasers' accounts. Exhibit 168 is a record showing a loan on a piece of property described as the West one-half of the Northeast one-fourth, of Section 14, Township 120, North Range 22 West Hennepin County, Minnesota. Exhibit 166 is a transfer of this property subject to the outstanding account with the Federal Land Bank to Thomas W. Banks and Rita L. Banks from Lyle G. Nichols and Lucy F. Nichols. The date this transfer was prepared was October 17, 1946 but that does not necessarily indicate the transfer date. On the third page of Exhibit 167 it shows that the payment of the installment due April 1, 1946 was made by Lucy G. Nichols and subsequent payments were made by Mr. and Mrs. Banks. Exhibit 167 is a record of payments made on account to the National Farm Loan Association office at Buffalo, Minnesota, where these accounts are handled. The payment after the payment of April, 1946,

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was received on November 14, 1946 when we received checks of Rita Banks. The balance due and owing on this account as of December 31, 1946 was $1,072.18. As of December 31, 1947 it was $990.15 (Exhibits 166, 167 and 168 are offered and received in evidence and it is agreed that photostats might be used to replace the original exhibits.)

HAZEL L. AARHUS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 2544 Harriet Avenue, Minneapolis, Minnesota, and am engaged in the business of building homes and interior decorating. In February of 1933 I owned the property located at 3817 Drew Avenue South, Minneapolis, Minnesota, and I sold it to Thomas and Rita Banks. Exhibit 169 is the financial statement that I made and in it I recorded the transaction made with reference to the property at 3817 Drew Avenue. The consideration which I received for this property was $11,500.00. $1,500.00 was paid down and there was a mortgage of $5,000.00 which was assumed by Mr. Banks; $4,000.00 on a contract for deed and there was a trade in of a lot for $1,000.00. Payments on the contract for deed were $60.00 per month and the payments were made regularly.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 23, 1952. Appearances are as has been heretofore noted.

J. HOMER THOMPSON called as a witness on behalf of the United States, after being first duly sworn, further testified as follows:

Direct Examination

Exhibit 170 is a record of the cashier's checks purchased showing the payee, the amount, the number of the check and

under the heading "purchased by" it is identified as to what the check was used for and who purchased it. Exhibit 170 relates to the cashier's checks contained in Exhibit 117. The item of $4,406.89 represents a check in connection with the original Casablanca loan which was made on the basis of 80 per cent of the invoice value and there were some off brands of liquor on which the bank did not loan the full 80 per cent. The party who made the loan did not remember definitely but it was a lesser amount than 80 per cent. At the time the Casablanca loan was converted into two loans to the Shanghai Cafe and Harold's Cafe there was that much difference to bring the loan back up to a full 80 per cent. It, therefore, amounted to an increase in the loan and the check was made payable to both the Shanghai Cafe and Harold's Liquor Store. Exhibit 117 Z-27, which is our cashier's check No. 58553, is marked "purchased by Harold's Liquor Store" payable to William Donnelly in the amount of $432.55. That indicates that when there was liquor drawn at that time by Harold's Liquor Store, we applied 80 per cent to the loan and made this check out for the other 20 per cent. The same situation prevailed with relation to all the remainder of the check. That is Exhibit 170 shows on the right hand side who purchased it just as I have explained the previous one. In some instances the name is not indicated but where "L&D" is marked or where "Us" is marked. The cashier's check representing the 20 per cent to be held in our collection file for pick-up. (Exhibit 170 is offered in evidence only insofar as it pertains to the checks we are interested in and is received in evidence.)

CLARK I. HENRIKSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at Route 3, Wayzata, Minnesota. I am associated with the Wheel Service Company as president and their office is located at 2375 University Avenue, St. Paul. I have

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been recently subpoenaed to bring certain books and records into court including a stock certificate book. I have not brought such records and I have made a diligent search for such records. The company has been in existence for approximately 25 years, but the existing corporation has been in existence only since 1946. The existing corporation took over certain assets of the prior existing Wheel Service corporation and also took over its physical location, accounts receivable and accounts payable. I do not know what happened to the records of the old corporation with reference to stock ownership and that old corporation was dissolved in 1944. I believe Mr. Wangaard, an attorney of Minneapolis, handled the dissolution of that corporation. I have reason to believe that when we moved our business the old books and record were either destroyed or misplaced.

OWEN V. HARRIS called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live in Robbinsdale, Minnesota and I am employed as an assistant cashier at the University National Bank. Exhibit 171 is a certified check drawn on the University National Bank of Minneapolis. The maker of the check is Levine and Levine, Attorneys at Law. The check is numbered 8185 and there is another document attached to the top of the check which is the general entry copy of the bank which facilitates our charge to the maker's account in certifying the check.

Exhibit 172 is a certified check dated November 1, 1947, numbered 8184 and the duplicate certificate memorandum of the University National Bank bearing a number thereon of 2836.

(Exhibits 171 and 172 are offered and received in evidence without objection.)

Exhibit 171 is a check dated Nov. 1, 1947 made payable to Stanley M. Lyman and bears the endorsement of the Midland National Bank, having been deposited to the account of Stanley M. Lyman and is in the amount of $4,404.40. Exhibit 172 is dated Nov. 1, 1947 and in the amount of $5,595.60 and is payable to Thomas W. Banks and Rita L. Banks. It is endorsed by Thomas W. Banks, Rita L. Banks and Koolaire Incorporated. It was endorsed to the First National Bank of St. Paul and subsequently endorsed by that bank to the University National Bank for clearance.

DAVID A. FREEDLAND called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 132 Wentworth, West St. Paul, Minnesota. I am office manager of Koolaire Incorporation, which business is located at 310 Cedar Street, St. Paul, Minnesota, and is engaged in the business of air conditioning, refrigeration and small manufacturing. I am also secretary-treasurer of the corporation. Exhibits 173 and 174 are cash books of Koolaire Incorporated.

Page 238 of Exhibit 173 shows a transaction wherein Thomas Banks acquired certain stock. Page 250 of Exhibit 174 contains some entries with reference to the acquisition of stock by Thomas W. Banks. Exhibit 175 is sheet No. 82 of the general journal and has to do with the acquisition by Thomas Banks of certain shares of stock in your company. (Exhibits 173, 174 and 175 are offered in evidence.)

(Cross-Examination as to Foundation for Exhibits.)

The name of Thomas Banks does not appear on page 238 which is Exhibit 173.

(Direct Examination Continues)

There is an account number that would associate this entry with the other entry in our books and that is account No. 72 which is the sale of stock in account 100 to notes payable. That account number appears on Exhibit 175 of page 82. Exhibit 182 is the stock certificate book of common stock of Koolaire Incorporation. Exhibits 176 through 181 are from the general ledger of the company. Exhibit 183 is the stock register of Koolaire Incorporated and refers to the preferred stock. The other exhibits, consisting of journal sheets and journal ledger sheets refer to stock certificates issued to Mr. Banks in Exhibit 182 or 183. Exhibit 184 is a set of duplicate deposit slips in the First National Bank of St. Paul for Koolaire Incorporated, the first entry being October 31, 1947 and the last entry being December 24, 1947. Exhibit 184 A is a page from Exhibit 184 and represents a deposit in the First National Bank on November 6, 1947. Exhibit 184 B is a deposit slip by Koolaire in the First National Bank on December 6, 1947. Exhibit 176 is a general ledger of the company and this seems true as to each of the Exhibits 176 through 181. The page number of the general ledger is in the right hand corner of these exhibits.

In Exhibit 177 the ledger account number is 152. In Exhibit 178 the general ledger account number is 907. In Exhibit 179 the general ledger account number is 102. In Exhibit 180 the general ledger account number is 1. In Exhibit 181 the general ledger account number is 72. (Exhibits 173 through 184 B are offered and received in evidence.)

The first entry in a chain of events which ultimately resulted in the issuance of stock to Thomas W. Banks is the entry on November 6, 1947 on Exhibit 173. Page 238 of Exhibit 173 shows cash received in the amount of $28,400.60 and credited to capital stock subscription $23,400.60, account

No. 72 and a credit to notes payable account number 102 in the amount of $5,000.00.

Exhibit 179 represents a credit of $5,000.00 from Exhibit 173. The entry shows a reference to the cash book, page 238 and that shows a $5,000.00 credit to cash in account No. 102 contained in Exhibit 179. The name of the person who owns the $5,000.00 credit is not shown on Exhibit 179. Later on stock was issued for the notes payable. Exhibit 185 is a record of journal entries of December, 1949. With reference to the $5,000.00 on account No. 102, there was stock issued from the common stock register book in December, 1949. Account No. 102 is the place where the $5,000.00 was credited as a receivable. (Exhibit 185 is offered and received in evidence.)

Stock was issued the date that the $28,400.00 was deposited with your company and it was issued to Thomas Banks and Harry Clark. 100 shares were issued to Thomas Banks and 100 shares to Harry Clark and the date of the issuance was November 6, 1947. That stock was still outstanding as of the end of 1947. The credit of $5,000.00 was still on our books at the end of 1947 and ran to the credit of the person who deposited the $28,000.00. Later on shares of stock were issued for the $5,000.00 and 25 shares were issued to Banks and 25 shares to Harry Clark. I then charged off the notes receivable in the amount of $5,000.00 in payment of those shares.

Q. Did Mr. Clark subsequently make an additional deposit to pay for the stock that was issued him?

A. Yes.

Mr. Hoffmann: If the Court please, may the answer be stricken?

The Court: It may be stricken for an objection.

Mr. Hoffmann: If the Court please, objection is made to the line of inquiry now pursued by the district attorney

for the reason and on the ground that there is no materiality established and particularly its materiality is objected to on the basis of our standing objection that the transaction now proposed to be inquired into in the light of the witness' testimony, I would assume was subsequent to December 31, 1947.

The Court: Can you connect this with the material parts of the case?

Mr. Lord: Your Honor, I propose to do it to clarify this transaction wherein Mr. Clark and Mr. Banks both deposited money, it was comingled and certain shares were issued, and it is my purpose in making this inquiry to show what Mr. Banks' investment was in the shares that were issued to him, and in order to do that I propose to show what Mr. Clark paid for his shares.

The Court: You may proceed. The question may be answered. The objection is overruled.

Mr. Lord: Would you read the question, Mr. Reporter?

(The question and answer were read.)

Mr. Hoffmann: If the Court please, the answer demonstrates the fallacy of the District Attorney's premise.

The Court: Well, we will have the facts and see what the situation was, if this witness can give the facts.

Q. (By Mr. Lord.) Mr. Freedland, when the stock was issued on the date of deposit of $28,400.00, what amount of that money went to pay for the 100 shares of stock issued to Mr. Thomas W. Banks?

A. $15,700.00.

Q. Take the $28,400.00 and subtract from it the $5,000.00 which you put in,—was it notes receivable?

A. Notes payable.

Q. Notes payable, which I believe leaves the sum of $23,400.00, does it not?

A. That is right.

Q. If you take away from that sum of $23,400.00 the amount which you say Mr. Banks paid for his shares, which was what amount again?

A. $15,700.00.

Mr. Hoffmann: May I, for the purpose of an objection, Your Honor, inquire as to whether the District Attorney is now asking these questions based upon the witness' recollection or upon some record? If the latter be the fact, we ask that the best evidence be produced.

The Court: Have you got it in the record?

Mr. Lord: It is in the record, Your Honor, but for the purpose of clarification, I believe that it is almost impossible to understand these records for this Court and jury without this man's explanation.

The Court: This witness may explain the records,—call attention to the entries and what they were made for.

Q. (By Mr. Lord.) Mr. Freedland, is it or is it not so that when Mr. Banks was issued his stock and $5,000.00 was credited in another account and Mr. Clark was issued an amount of stock equal to the amount issued to Mr. Banks, that there was still due and owing on the stock issued to Mr. Clark an amount equal to approximately $8,000.00?

A. That is right.

Q. When was that $8,000.00 paid by Mr. Clark?

A. About a month later,—I believe it was December 8th.

Q. Mr. Freedland, directing your attention to that $5,000.00 credit, you stated, did you not, that subsequently some stock was issued?

A. That is right.

Q. Was part of that stock issued in the name of Harry Clark?

A. 25 shares.

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Q. How many shares were issued in the name of Mr. Banks?

A. 25.

Q. What, then, would you say was the value of each of those shares of stock?

Mr. Hoffmann: That is objected to as calling for an opinion, a conclusion, and not the best evidence.

The Court: That is true, and without foundation. If this witness can qualify to testify as to value, he may do so.

Q. (By Mr. Lord.) What did Mr. Banks pay for that 25 shares of stock?

A. $2500.00.

ARTHUR W. FLANNAGAN called as a witness on behalf of the United States, after being first duly sworn, tsetified as follows:

Direct Examination

I live at 316 Meander Road, Minneapolis. I am manager of the Mortgage Accounting section of the Investors Syndicate. Exhibit 186 is an itemized statement of the Mortgage Loan Department of Investors Diversified Services, Incorporated, bearing date of May 19, 1951, and contains the name Hazel Aarhus and Thomas W. Banks, 3817 Drew Avenue South, loan No. 11-20236. Exhibit 187 is a mortgage ledger of Investor's Syndicate No. 11-20236 and which refers to the mortgage at 3817 Drew Avenue South. (Exhibits 186 and 187 are offered and received in evidence.)

Exhibit 186 shows the payment on the mortgages and the balances resulting after such payment. Exhibit 187 shows the payments on that mortgage and the balances owing as of each date when a payment is made. As of December 31, 1936 the balance owing was $3,925.79 and the mortgage was

finally satisfied and paid off on November 1, 1944. As of December 31, 1942, the balance was $2,066.73. As of December 31, 1943 the balance would be $1,187.87, but there may be a variance of $2.00 or $3.00 because of the accrual of interest.

ROBERT SCHUETTLER called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 1408 West 28th Street, Minneapolis and I am 33 years of age. I am employed as a salesman in the jewelry business. In November, 1944, I borrowed $10,000.00 in cash from Thomas Banks. I used the money to buy the Marquette Bar from Stelle O'Neil. The loan was made at about the time I purchased the bar. I sold the bar in approximately February of 1945 at which time I paid back the $10,000.00 to Mr. Banks.

TIMOTHY E. BUCKLEY called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 666 East Montana Avenue, St. Paul, Minnesota, and I work for the Commercial Investment Company. Our business is the buying, selling, loaning and managing of real estate. Exhibit 189 is an earnest money contract for the sale of the O'Neida Building in Minneapolis. Exhibit 188 is a bill of sale dated November 4, 1944. There is no signature on Exhibit 188. My recollection is of having executed an instrument similar to that and delivered to Mr. E. W. S. Yeates, a realtor in Minneapolis. Exhibit 190 is an escrow agreement having to do with the sale of the

O'Neida Building bearing date of October 26, 1944. Exhibit 191 is a journal entry having to do with the sale of this property. Exhibit 192 is a ledger card from our bookkeeping system representing the income from the sale of the O'Neida Building property. (Exhibits 188 to 192 are offered and received in evidence.)

CLARENCE J. MCCONVILLE called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 8555 Portland, Minneapolis, Minnesota. I am a lawyer employed by the Title Insurance Company of Minnesota. Exhibit 193 is an escrow card showing the transaction of our title No. 121866. This exhibit is a record of the escrow agent referred to in the escrow agreement and has reference to the property known as the O'Neida Building. (Exhibit 193 is offered and received in evidence.)

FREELAND W. HARLOW called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 6019 Minnetonka Boulevard, St. Louis Park, Minnesota. I am the general agent for the Penn Mutual Life Insurance Company, in Minneapolis and in the northern part of the State and our address in Minneapolis is at 1111 Nicollet Avenue. Exhibit 194 is a policy record card which is kept on every policy owner that the company has. It has to do with a policy of life insurance issued by our company on the life of Thomas W. Banks and was issued in 1925 and is still in effect. The reverse side of Exhibit 194 shows

that there was a loan made on the policy on December 27, 1932 in the amount of $1,500.00. As of December 31, 1936 the balance owing on the loan was $1,500.00 and the loan was paid in full on May 28, 1941. (Exhibit 194 is offered and received in evidence.)

Mr. Lord: If the Court please, the Government and Mr. Banks, through his counsel, and the Government through its counsel, have agreed upon a stipulation in this matter, which I should like at this time to read into the record.

"IT IS HEREBY STIPULATED AND AGREED in the above-entitled matter as follows:

"I

"That Internal Revenue Agents had books and records of Pearson News Service available to them at one time, and since said books and records are not now available, transcript thereof may be admitted as best evidence and the defendant waives any objection under the best evidence rule or for lack of foundation.

"II

"That books and records of Pearson News Service, turned over to the Government by Pearson News Service for years 1946 and 1947, may be admitted in evidence without objection as to foundation.

"III

"That photostatic copy of Pearson News Service check No. 1619 dated June 29, 1943, in the sum of Five Thousand Dollars ($5,000.00), is a true copy of an original check, no

longer available, and may be admitted in evidence and without objection on the ground it is not the best evidence.

Dated, May 23, 1952.

/s/ PHILIP NEVILLE
United States Attorney for the District of Minnesota

/s/ C. U. LANDRUM
Special Assistant United States Attorney

/s/ MILES W. LORD
Assistant United States Attorney
Attorneys for Plaintiff

HOFFMANN, DONAHUE, GRAFF & MEIER
By /s/ JOHN W. GRAFF
/s/ A. JEROME HOFFMANN
/s/ RICHARD KYLE
Attorneys for Defendant."

(Exhibits 195, 196, 197, 197A, 198, 198A, 199 and 200 being books and records of Pearson's News Service and particular pages thereof are offered in evidence. These exhibits are objected to as to such parts that do not pertain to 1945, 1946 and 1947 on the ground that they are immaterial and irrelevant to the triable issues in this case. The exhibits are received in evidence.)

BEN R. TOENSING called as a witness on behalf of the United States, after being first duly sworn, further testified as follows:

Direct Examination

I have produced in court further books and records of the Flour City Body Corporation. By stipulation between counsel they are agreed to be the books of said company.

ELMER P. HANSON called as a witness on behalf of the United States, after being first duly sworn, further testified as follows:

Direct Examination

Exhibit 201 consisting of 28 parts consists of forms 899. Form 899 is a certificate of assessments and payments. It shows the names of the taxpayer, the taxable period, the year, the account number, the amount assessed, date of payment, amounts of payments and credits and constitutes official records of the Bureau of Internal Revenue.

Exhibit 201 shows the income tax paid by Thomas W. Banks from the year 1937 to 1947. Exhibit 201 also reflects the payments made by Rita Banks for the same period. (Exhibit 201 is offered in evidence.)

Cross-Examination

Exhibit 201 covers years other than 1937 to 1947 and it covers items other than the tax. (Ruling on admission into evidence on Exhibit 201 deferred.)

PHILIP BRANCHEAU called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at the Sheridan Hotel, Minneapolis, and I am a realtor. I am engaged in the listing, selling and appraising of practically all types of real estate. I was served with a subpoena to bring certain documents here and I have brought what I was able to find. Exhibit 202 is an earnest money contract dated August 26, 1946, covering the property described as the Southeast Quarter of Southwest Quarter of Lots 4 and 5, in Section 10, Township 120, lying north and east of the so-called Dayton or West River Road, as now laid out, in the County of Hennepin and State of Minnesota.

Exhibit 203 is a quit claim deed dated April 1, 1946, from Lavina Hall as grantor to Gustaf Schlenger, as grantee. (Exhibits 202 and 203 are offered in evidence and are objected to on the ground of immateriality and irrelevancy and are received in evidence.)

I have handled a transaction concerning the property located at 5538 Excelsior Boulevard, Minneapolis, Minnesota, the negotiations of which started in 1940. The property was sold to Mr. and Mrs. Banks. Thereafter the property was improved and made into a duplex residence dwelling. Exhibit 57 covers the property which has been referred to as 5538 Excelsior Boulevard. $21,000.00 was paid for this property. Under my supervision between $9,000.00 and $9,500.00 was spent in improvements on this property from the Fall of 1941 to October, 1942. Exhibit 56 recites a consideration of One Dollar and other good and valuable considerations. The amount paid for this property was $14,800.00. Exhibit 204 is the earnest money contract covering the property just referred to as the easterly five feet of the original description that was in the conveyance by the Zahn estate to Mrs. Rita L. Banks and that is shown on Exhibit 57. (Exhibit 204 is offered in evidence and received.) I had occasion to handle some property owned by William Hesli. Exhibit 205 is a form of earnest money contract dated August 7, 1945, and bears my signature as agent. (Exhibit 205 is offered and received in evidence.)

Exhibit 205 contains 88 acres of farm land located in northwest Hennepin County and the purchase price paid for that property was $5,000.00 under date of August 7, 1945, which was paid at the time of the delivery of the deed. I have had occasion to handle property and a conveyance from Rita Banks to Minnie M. Donahue. Exhibit 206 is an earnest money contract dated September 27, 1944, made out to Mrs. Minnie M. Donahue in the purchase of certain residential property. (Exhibit 206 is offered and received in evidence.)

Exhibit 206 is the earnest money contract pursuant to which the deed in Exhibit 54 was delivered. The $8,500.00 stipulation in the instrument was the full and true consideration for the conveyance. I handled the transaction described in Exhibit 43 which recites a consideration of One Dollar and other valuable consideration subject to an unpaid mortgage. The amount of that mortgage was $4,704.45. This describes the property known as the Pearson farm. The price paid for the property was $8,500.00. I have had something to do with the management of the property known as the 10th Street Realty property. This property is located at the Northwesterly corner of Third Avenue South and Tenth Street in the City of Minneapolis, opposite the Leamington Hotel, kitty-corner from the Curtis Hotel. I have managed the property since the date of purchase by Mr. Clark and Mr. Banks who purchased it from the S. T. McKnight Company in 1946. The building was dismantled in late 1950 and early 1951. I still manage the property.

I managed it on behalf of Mr. Clark and Mr. Banks until it was incorporated under the 10th Street Realty Company which was in late 1946 as I recall. I am the agent for the 10th Street Realty Company and have money in the bank under their name. I am the secretary of the corporation. I am not familiar with Exhibits 22 and 23. The records which I have brought with me represent deposit slips for deposits made with the Marquette National Bank to the account of Philip Brancheau, agent for H. Harvey Clark commencing October 17, 1946 and terminating at the end of 1947. The yellow sheets attached to those exhibits or documents are my stubs removed from the check book of the 10th Street Realty Company showing deposits of rents and checks issued in payment of expenses. I made an annual report each year of this property for income tax purposes and I also have a record of certain advances made by Mr. Clark and Mr. Banks. I have not been able to find any records other than the ones that I have brought to Court.

HOWARD H. GELB called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 1186 St. Paul Avenue, St. Paul, Minnesota and I am an attorney practicing law in St. Paul. In 1947 I entered into a transaction involving the purchase of the O'Neida Building in Minneapolis and I dealt with Philip Brancheau. Exhibit 207 is a contract for deed between Thomas W. Banks and Rita L. Banks as parties of the first part and Harold Siegel and myself as parties of the second part. (Exhibit 207 is offered and received in evidence.)

Mr. Lord: The Government calls Mr. Harry Clark, Mr. Thomas Ewing and Mr. Harry Shepard. None were present or responded.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 24, 1952. Appearances are as has been heretofore noted.

ERNEST P. LORENZ called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live in Minneapolis, Hennepin County, and I am Clerk of the Probate Court of Hennepin County. We have a probate court file No. 68367, the estate of M. J. O'Connor. In this estate is a record of a proof of claim filed by Thomas W. Banks which is exhibit 208. Exhibit 209 is a release of claims executed by John B. O'Halloran dated January 17, 1951, and filed in the office of the probate court on February 2, 1951 in the estate of M. J. O'Conner. It has reference to the $3,000.00 note and proof of claim mentioned in Exhibit 208. Exhibit 210 is the final account of the administratrix in the estate of M. J. O'Connor and it shows the payment of $2,000.00 of said claim to John B. O'Halloran as assignee of the claim. (Exhibits 208, 209 and 210 are offered and received in evidence.)

I brought with me probate court file No. 44002, being the file for the estate of Jessie McRae Zahn. Exhibit 211 is a report of a sale of real estate dated October 20, 1941 showing the report of the administratrix of the estate of a sale of property to Rita L. Banks in the sum of $2,000.00 and Exhibit 212 is the Court's Order of Confirmation of that sale. The description in Exhibit 57 is the same as in Exhibits 211 and 212. (Exhibits 211 and 212 are offered in evidence and are objected to on the ground of their being immaterial and irrelevant and are received in evidence.)

AL PETERSON called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I am the Chief Deputy Auditor of Hennepin County, Minnesota. Exhibit 213 is a statement of the tax on the Easterly corner of Fourth Street and Marquette Avenue South in Minneapolis, described as Lot 64, Auditor's Subdivision No. 156, taxes paid in full in the amount of $649.95. This tax statement comes from the Treasurer's office and after the first of the year the books are turned over to us. (Exhibit 213 is offered and received in evidence.) The property covered by this exhibit is the property commonly known as the O'Neida Building. The taxes represented by Exhibit 213 are the taxes for the year 1944 which are due and payable in 1945.

HOWARD W. MELBOSTAD called as a witness on behalf of the United States, being first duly sworn, further testified as follows:

Direct Examination

I have testified previously and in the course of my investigation I had occasion to visit the office of Music Installations, Incorporated at 1316 Nicollet Avenue, Minneapolis. It

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was in the Fall of 1946 and I was given certain records of Music Installations. Exhibit 214 is a transcript which I made of the capital stock account of Music Installations, Incorporated taken from the books of that company.

Mr. Graff: May I ask the witness a question or two concerning this exhibit?

The Court: Yes.

Q. (By Mr. Graff.) Mr. Melbostad, did I understand your testimony on direct examination to be that 214 was a transcript made by you of the capital account of Music Installations, Incorporated?

A. Yes.

Q. It contains other things, does it not, Mr. Melbostad?

A. Yes, sir.

Q. Other than the transcript of the capital account?

A. Yes, sir, it does.

Mr. Graff: At this time, if the Court please, we will object to Government's Exhibit 214, it appearing that this is an exhibit copied, or written by this individual from written original books and records, on the ground that it is not the best evidence, and on the further ground that it is hearsay.

The Court: The objection is sustained.

Mr. Landrum: If the Court please, might we be permitted to be heard on that question? I respectfully say to the Court that we feel that it is somewhat important in this action and with the Court's permission, we would like to have an opportunity to present the situation as we view it as a matter of law.

The Court: If you lay the proper foundation, that may change the situation. Now, I have not the least idea of what is on that exhibit. There is data other than the capital account of Music Installations, Incorporated.

Mr. Lord: I proposed—

The Court: (Interposing.) Just a moment. This witness went to the books of some concern and he has had copied or copied himself certain data from certain records. Well, of course, those records would be the best evidence. Anyway, we should know something about what we are receiving in evidence on this exhibit, 214.

Q. (By Mr. Lord.) What other entries did you make on this exhibit?

Mr. Hoffmann: If the Court please, that is objected to as calling for the interpretation of an instrument already excluded by a ruling of the Court, and a circumvention of the Court's ruling.

The Court: I think that is correct.

Mr. Lord: It was not intended as such, Your Honor. I interpreted the ruling to mean that I should further explain the way in which the document was assembled and then lay my foundation for the best evidence.

The Court: Why don't you show when this witness made this examination and what books and records he examined and furnish the foundation for this exhibit? You have not done it.

Mr. Lord: Yes, Your Honor.

Q. (By Mr. Lord.) Mr. Melbostad, when you were at the company, as you mentioned, at their office, did you make any examination of their books and records with reference to the surplus account?

A. Yes, I made a transcription of the surplus account.

Q. (By Mr. Lord.) After having examined the surplus account, what did you do then?

A. I transcribed the surplus account on the same sheet of paper that the capital account was on.

Q. And is that Government's Exhibit 214?

A. Yes.

Q. Mr. Melbostad, do you know where the books and records of Music Installations, Incorporated, are?

A. I do not know where they are now.

Q. Do you know whether or not that company has been dissolved?

A. No, I do not.

LEONARD H. WEINSTOCK called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

I live at 403 Fulton Street, St. Paul, Minnesota, and have lived in St. Paul since 1912. I am 56 years of age and I am engaged in the business of being a public accountant and have been so engaged since 1920. I am not a certified public accountant. I went to work for an accounting firm in 1920 and I was with them until 1921 and I went into practice for myself in 1921. From 1921 up to the present time I have been in the acounting business for myself. My office is located at 506 Plymouth Building, Minneapolis, Minnesota. I have engaged in a general practice and I have also done tax work during those years in connection with the accounting or separately. I was employed by Music Installations to liquidate the remnants of what was Music Installations. The liquidation of Music Installations, Incorporated was commenced, I think a couple of years ago. I do not know what became of the books of the corporation. I did have them at one time but I turned them back to the company. I believe Mr. Shepard took the books back and the last time I saw the books was about two years ago. I have done some work or my office has done some work for Banks and Shepard, a partnership, within the last two years. I did not have books and records of the partnership in my possession but there were some work papers had in connection with it. I had no relationship to them except in the last two years.

Prior to that any information I received was prepared by other accountants. I had nothing to do with it and I think about a year ago the property was sold and we did some work in connection with that. I do not have any records with me of Banks and Shepard, a partnership. I have turned over some of the records I had to Mr. Graff. It included some of the records pertaining to the Blue Goose and McCarthy's St. Louis Park Cafe. I think my office prepared the corporation tax returns for the Banks and Shepard corporation.

To my best recollection I have not had any books and records of the B and S Corporation in my possession. The books and records of Coin-A-Matic were in my office at one time. They were brought up for the convenvience of the government and left in my office. They were worked on in my office and then returned. This was a couple of years ago and I believe Mr. Melbostad and Mr. McCart originally worked on them and I think later Mr. McKusick worked on them. Mr. McKusick did not make a transcription of any books in my presence. I think Mr. McKusick took the books with him and I do not know where they are now. I know Thomas W. Banks and I have known him since the latter part of 1942. I have met his wife, Rita L. Banks a few times. The first time I met her, I would probably say, was in the latter part of 1942 or 1943.

She has come into my office and signed tax returns. I have, as an accountant, prepared the Federal income tax returns for Thomas and Rita Banks for the years 1942 to 1951. In connection with the preparation of those returns, various people brought the information to me from which I prepared the returns. Mrs. Banks sent me some papers and bills and cancelled checks, etc. I do not recall specifically by whom she sent the information. I think Mr. Banks brought them up at one time. Neither Thomas Banks nor Rita Banks ever furnished me with any personal account books. Thomas

Banks brought to me such income as he had from what was called the "the book" i.e., Pearson News and that information was given to me by Mr. Banks personally. It was usually given to me on an adding machine tape. Mr. Banks told me that the source of the income was wagering. That was what Mr. Banks brought to me to incorporate in his income tax returns insofar as his income from the Pearson News Service was concerned. I could not answer what proportion of his income came from wagering without knowing what else was in the tax returns for those years.

In connection with the returns which I made out and in which I included amounts for wagering, there was no information given to me as for the source of any particular money that was included in the total.

I have heard of Casablanca Incorporated. Some of my employees did some bookkeeping for them and we prepared their tax returns. I held a trusteeship which grew out of or from the Casablanca. I had a power of attorney to act for Mr. Donnelly. Exhibit 35 is a power of attorney to represent Thomas Banks dated April 5, 1951, and it is the power of attorney under which I did represent him. (Exhibit 35 is offered and received in evidence.) (Exhibit 35 was read to the jury by Mr. Landrum.)

I was not a liquidating trustee for a Mr. Donnelly. Mr. Donnelly operated the Casablanca Cafe which was a continuation of the old Casablanca. I do not know from whom Mr. Donnelly purchased the Casablanca Cafe. In connection with my business I carried a trustee account in which all funds that were left with me for any purpose were deposited. It was a general fund under the name of Leonard H. Weinstock, trustee. I was trustee for numerous people and some of the funds of Thomas Banks were deposited in that account as well as some funds of Rita Banks. From that account I paid taxes and transacted other business. The cashier's checks on Hennepin State Bank in Exhibit

117 which were endorsed by me as a trustee were deposited in my trustee account. Not all of the cashier's checks in Exhibit 117 were endorsed by me. The checks in Exhibit 117 which I endorsed were placed in my trustee account which was the same account in which I deposited funds of Mrs. Banks. From that account I made disbursements from time to time.

On October 31, 1947, I drew a check against the trustee account to a man by the name of Len Welsh. Exhibit 215 is my check No. 190 issued on October 31, 1947 to Len Welsh for $5,000.00. The check was endorsed by Mr. Welsh and cleared the bank. This account came out of the Donnelly trust account. That is the one we have been talking about. These checks were Mr. Donnelly's checks turned over to me as trustee and I put them in my own trust account. I was told to turn over the funds of the Donnelly trust account to Mr. Banks. I was to credit the Donnelly trust account to Mr. Banks indirectly. The check which I drew came from funds which I was told to turn over to Mr. Banks. (Exhibit 215 is offered and received in evidence.)

I kept a record of the $5,000.00 check made payable to Len Welsh and it does not show repayment by anyone of the $5,000.00. I do not have the original record, but I have a transcript of it. I had the original in my files but my files have been pulled apart so many times going through them that I am not too sure where it could be. I had original work sheets but I do not have them here. I had records in connection with what is known as the Daily Mail. I do not know whether there were any records specifically pertaining to the $5,000.00 check.

The records of the Daily Mail do not show a repayment of that $5,000.00 by anyone.

Q. (By Mr. Landrum.) Mr. Weinstock, shortly after you received this power of attorney, which is in evidence in this case, from Mr. Banks, state whether or not you discussed

with Mr. McKusick or with Mr. Kleven the living expenses of Thomas W. Banks,

A. Yes, sir.

Q. State whether or not you discussed the fact that you had such discussion with Mr. Banks? Mr. Banks knew you were talking about it, did he not?

Mr. Graff: Just a moment. Would you read the question, Mr. Reporter?

(The question was .ead.)

Mr. Graff: I suggest that question is rather compound, Your Honor.

The Court: Yes, it is compound. (To the witness.) You may answer the question, if you can.

A. My discussion of the matter was with Mr. O'Gordon.

Q. (By Mr. Landrum.) Did you not discuss it with Mr. McKusick and Mr. Kleven?

A. That is right.

Q. You did, did you not?

A. Yes.

Q. Thank you sir. At that time state whether or not you reached an agreement with Mr. McKusick and Mr. Kleven with relation to the living expenses of Mr. Banks for certain years?

Mr. Graff: Just a moment. I will object to that on the ground that it asks for a conclusion and does not ask for a statement of fact.

The Court: (To the witness.) You may answer.

A. We did agree on a maximum cost of living in various years.

Mr. Graff: By "we", pardon me, counsel—

Mr. Landrum: I will ask him about that.

Mr. Graff: All right.

Q. (By Mr. Landrum.) You and Mr. Kleven and Mr. McKusick did agree on what you say was a maximum living expense for Mr. Banks for certain years, did you not?

A. Yes, sir.

Q. And state whether or not those years were 1942, 1943, 1944, 1945, 1946, and 1947?

Mr. Graff: Now, just a moment. I am going to object on the further ground that whatever discussion was had was not had in the presence of the taxpayer and hence is not binding upon him, and is therefore hearsay and incompetent as far as the defendant is concerned.

The Court: (To the witness.) You may answer.

Q. (By Mr. Landrum.) That was the years was it not?

A. Those were the years we covered.

Q. And state whether or not the agreement which you reached with these gentlemen, was that for the years 1942, '43, '44, and '45 that expense should be $10,000.00 a year?

Mr. Graff: Just a moment. I will make the same objection to that question that was made to the previous question, Your Honor.

The Court: (To the witness.) You may answer.

A. I don't recal specifically the amounts as they applied to various years. I would have to see something to refresh my memory.

Q. (By Mr. Landrum.) Well, Mr. Weinstock, you recall that the figure of $10,000.00 a year was arrived at, do you not?

Mr. Graff: Just a moment. I will object to this line of questioning, Your Honor, on the ground that it is leading and suggestive.

The Court: Well, that may be leading and suggestive, counsel. I think you could ask the question perhaps in a different form.

The Witness: I don't recall the specific amounts as to specific years.

Mr. Graff: Just a moment, Mr. Weinstock—

The Court: (To the witness.) You may answer.

A. I do not recall specific amounts as to specific years.

Q. (By Mr. Landrum.) But you do know that you did have such an agreement, is that correct?

Mr. Graff: Just a moment. That is objected to as argumentative, leading and suggestive. This is direct examination of this witness.

The Court: (To the witness.) You may answer the question.

Q. (By Mr. Landrum.) You did have an agreement, didn't you?

A. We did reach an agreement on an amount.

Q. Mr. Weinstock, you testified under oath before the Grand Jury in this matter, did you not?

A. Yes, sir. I don't recall of testifying as to this particular thing but I may have.

Q. State whether or not before the Grand Jury, under oath in response to the following questions, you did not make the following answers, Mr. Weinstock—

Mr. Graff: Now, just a moment, Your Honor. Before counsel can be permitted to attempt to impeach this witness or any other witness by reading from something written, it must appear that his testimony here is at variance with that given some other place, and I call the Court's attention to the fact that that foundation has not been laid.

Mr. Landrum: If the Court please, I desire to say to the Court that I am surprised at the evidence given by this witness and I desire to cross-examine him; that I hold in my hand the transcript of other testimony.

Mr. Graff: Well now, if the Court please, there has not been sufficient showing of surprise to warrant the cross-examination of this witness by the questions that have been asked so far.

The Court: Is there anything at variance in the witness' testimony today with that give not any other time?

Mr. Landrum: Yes, sir.

The Court: You have a transcript of it to show that?

Mr. Landrum: Yes, sir.

The Court: You may proceed.

Mr. Graff: If the Court please, may our objection heretofore stated run to the entire line of interrogation?

The Court: That may be understood.

By Mr. Landrum:

Q. Mr. Weinstock, I don't want to confuse you, sir, so I now come to you and I will ask you to state whether or not in response to the following questions propounded to you before the Grand Jury recently you did not make the following answers:—

Mr. Hoffmann: If the Court please, may the time of the alleged basis for the present interrogation be established by the Government and the place?

Mr. Landrum: Yes, sir, — proceedings before the Federal Grand Jury, St. Paul, Minnesota, Friday, May 2, 1952.

Mr. Hoffmann: Now, if the Court please, the record demonstrates that the indictment upon which the defendant is here charged was returned by a Federal Grand Jury January 14, 1952. It is now demonstrated by the District Attorney's statement that the interrogations he proposes to put to the witness on the basis of claimed surprise for the alleged purpose of impeachment were made on May 2, 1952.

The Court: What is the explanation, counsel?

Mr. Landrum: Well, if the Court please, the situation is that this witness was before the Grand Jury on May 2, 1952 and was asked these questions.

The Court: Is that when this testimony was given?

Mr. Landrum: Yes, Your Honor. It doesn't make any difference when he gave it; it is contrary to what he has given now.

Mr. Graff: I submit that counsel is not correct when he states that it doesn't make any difference when the testimony was given. There may be some serious questions that may be raised with respect to the propriety of having this witness before the Grand Jury on May 2, 1952.

The Court: Well, we will not thrash those questions out here at this time.

You may proceed with the examination.

Q. (By Mr. Landrum.) "Question: Subsequent to the date these questions were discussed and the answers returned, to the best of your knowledge did you ever have occasion to discuss with revenue agent Gerald Kleven or special intelligence agent McKusick the living scale of Thomas W. Banks?

"Answer: Well, I went over his schedule that was prepared by Mr. Kleven as to what he considered as living expenses and I told him I didn't care to get into any controversy over living expenses which entailed too many things. I thought it would be much better to settle a definite amount for the various years."

That was your answer?

A. That is right.

Q. "Question: Did you communicate that or express that to Mr. Banks?

"Answer: Yes, I communicated that to Mr. O'Gordon who was representing Mr. Banks at that time and Mr. O'Gordon over the telephone agreed with me, and then when I asked him to put it in writing he refused to do it. I later was back in the case with a power of attorney and that was the first thing I did, was to definitely agree on those points."

That was your answer?

A. That is right.

Q. And that is what I just asked you?

Mr. Graff: Now, if the Court please —

The Court: Just a moment. We will not have any controversy about this. Read the last question, Mr. Reporter.

(The question was read.)

Q. (By Mr. Landrum.) Your answer was "yes," was it not?

A. Yes.

Q. "Question: Mr. Banks knew that you so agreed?

"Answer: He knew that I so agreed."

That is the answer you made, wasn't it?

A. Yes.

Q. "Question: You talked it over with him before you made the agreement?

"Answer: Yes."

That is the answer you made before the Grand Jury, isn't it?

A. Yes, that is right.

Q. "Question: And he agreed on figures which you submitted?

"Answer: Unwillingly, but he did."

That is the answer you made, wasn't it?

A. That is right.

Q. "Question: By unwillingly, you mean that you as his adviser suggested that he agree to those figures?

"Answer: He thought they were too high in the later years and he finally agreed it would be all right."

That is what you said, wasn't it?

A. That is right.

Q. "Question: When he agreed, it was without equivocation?

"Answer: That is right."

That is what you said, wasn't it?

A. I believe so.

Q. Talk out so the jury can hear you.

A. I believe so.

Q. Yes.

Q. "Question: I believe you testified before that the living expenses which you agreed to and which Mr. Banks reluctantly acquiesced to came to $10,000.00 per year during the years '42, '43, '44 and '45?"

Your answer: "That sounds about the amount."

A. That is right.

Q. Yes. "Question: And $12,000.00 a year for '46 and '47?

"Answer: I believe that is right."

A. That is right.

Q. Yes. "Question: Has Mr. Banks ever seen fit to repudiate those figures in your answers?

"Answer: No."

A. That is right.

Q. That is what you said, wasn't it?

A. Yes, sir.

Mr. Graff: Now, if the Court please, I think it has now been demonstrated that the testimony of this witness here has not been at variance with the testimony given by this

witness before the Grand Jury, and I therefore move that there be stricken from this record all the questions and answers which were read by counsel for the plaintiff to this witness purporting to be from a transcript that he held in his hand. I further ask that the jury be instructed to disregard the testimony that they have heard.

The Court: Your request is denied. The record may remain as it is. I think there have been some slight variances. Of course, the jurors are the judges of what the evidence has been. They will rely on their own memory and they will draw their own conclusions from the evidence.

Mr. Landrum: You may cross-examine.

Cross-Examination

By Mr. Graff:

Q. Did I understand you to say, Mr. Weinstock, that you were before the Grand Jury on May 2, 1952?

A. Yes, sir.

Q. When you testified before the Grand Jury with respect to these living expenses, was Mr. McKusick or Mr. Kleven before the Grand Jury at that time?

Mr. Landrum: That is objected to, if the Court please.

The Court: Yes. That objection is sustained.

Q. (By Mr. Graff.) At the time that you testified before the Grand Jury, were any exhibits which had been prepared by Mr. McKusick or Mr. Kleven before the Grand Jury at that time?

Mr. Landrum: That is objected to. That is immaterial. I asked him what his questions and answers were, and that was all, Your Honor.

The Court: I think that is immaterial. I think that it is a matter that we should not go into in the trial of this case. You may ask him anything about what he testified to before the Grand Jury, if you so desire.

Mr. Graff: I did not hear the last part of the Court's —

The Court: You may inquire of this witness what his testimony was. If he desires to make any explanation of his testimony already given, he may do so.

Mr. Graff: Well, I think, Your Honor, I should have a right to show the circumstances under which his testimony was given.

The Court: No, we are not going into the records that were used before the Grand Jury or what other witnesses were present. This is not the place to go into the record of the testimony before the Grand Jury except insofar as this witness' testimony is concerned.

He may make any explanation of his testimony before the Grand Jury that may be desired.

Q. (By Mr. Graff.) Mr. Weinstock, in connection with these living expenses, did you have some conversation with Mr. McKusick?

A. Yes, sir.

Q. Did you have some conversations with Mr. Kleven?

A. Yes, sir.

Q. And were these conversations had prior to the time that there were any figures submitted as probable living expenses? Do you understand my question?

A. I believe they were originally discussed before actual figures were submitted.

Q. You and Mr. McKusick and Mr. Kleven had some preliminary discussions concerning living expenses, is that correct?

A. I think Mr. McKusick and I had some preliminary discussions.

Q. Now, what was the purpose and the reason for arriving at living expenses as explained to you by Mr. McKusick?

A. Well, it was to reach a point of settling the case.

Q. And so is it a true statement that the discussions that you had with Mr. McKusick with respect to the living expenses were for the purpose of arriving at a civil tax liability if there was one?

Mr. Landrum: Just a moment, if the Court please, — I beg your Honor's pardon. Did I get the witness' answer to the question?

The Court: You may read the question and the answer, Mr. Reporter.

The Witness: I did not answer it.

Mr. Landrum: You did not answer it?

The Witness: No, sir.

Mr. Landrum: All right. Then I want you to answer it.

The Witness: Ask me the question again.

The Court: Read the question, Mr. Reporter.

(The question was read.)

A. I never had any definite understanding with Mr. McKusick that it was to be a civil settlement, although all of my work and all of the things I had done in connection with the case was with that thought in mind, that effort.

Q. (By Mr. Graff.) When you had the discussion with Mr. McKusick about the living expenses, what did you and Mr. McKusick hope to accomplish by trying to arrive at some agreement with respect to it?

A. I know what I hoped to accomplish was a civil settlement.

Q. And did Mr. McKusick express himself to the same effect?

A. No, sir.

Q. Did he express himself at all in his discussion with you?

A. As to what type of a settlement?

Q. As to what the purpose of the living expenses were?

A. It was to wind up the case.

Q. And did you submit the figures to Mr. McKusick as part of your understanding that there was to be a civil settlement, if there was any civil tax liability?

A. That was my purpose in submitting them.

Q. And did you so inform Mr. McKusick?

A. No, sir.

Q. Now, Mr. Weinstock, you testified that you had a so-called Trustee account?

A. Yes, sir.

Q. Was this a trust account into which you put other people's moneys which were entrusted to you?

A. Yes, sir.

Q. Was this trust account established for the sole purpose of one individual?

A. No, sir.

The trust account that I had was a place to put other people's moneys which were entrusted to me. The trust account was not established for the sole purpose of one individual. I have had a trust account since 1942 or 1943 and the purpose of my having a trust account was that so funds of other persons would not be commingled. My trust account was not established for the sole purpose of accommodating Mr. Banks. It was for my own convenience in accommodating any and all persons who would give me money which I was to disburse. I had this account in the Lincoln Office of the Northwestern National Bank in Minneapolis. The funds that I received in the Donnelly matter I was directed to turn them over to Mr. Banks but it was not at the direction of Mr. Banks. The funds that I received in the Donnelly matter represented the remaining 20 per cent after 80 per cent went in payment of the loan. The transaction with the bank was a customary transaction. When I received the cashier's checks in Exhibit 117 I deposited them in my trustee account in the Lincoln Office of the Northwestern National

Bank and disbursed them in accordance with the directions that had been given to me.

I prepared the tax returns for Thomas Banks from 1942 to 1951. Exhibits 9, 10 and 11 represent the returns for 1945, 1946 and 1947 bearing my signature on the left hand side indicating that they were prepared by me or under my direction. I have a number of people in my office who work under the general supervision and direction and I had a number of such people working for me during the years 1945, 1946 and 1947.

Q. Now, preparatory to making up the tax returns represented by Government's Exhibits 9, 10, and 11, which have been identified as the '45, '46 and '47 tax returns of Thomas Banks, I will ask you this question: Did Thomas Banks give you information with which to make up the return?

A. He gave me some information.

Q. All right. And you got other information from where?

A. From the other accountants, from sets of books, partnership tax returns, possibly, that were submitted — copies of them.

Q. So that you had the tax returns which had been made where he would receive something and you had that amount to take from the tax returns?

A. That would be right.

Q. Let me ask you this question: At the time you prepared the 1945 tax return for Tom Banks, did he, to the best of your knowledge, withhold any bit of information from you which you might need in making up his 1945 tax return?

A. I never found any —

Mr. Landrum: Just a moment. That is not responsive to the question. I object to the answer and move it be stricken as not responsive.

The Court: Mr. Reporter, you may read the question. (To the witness.) Give close attention, Mr. Weinstock, and undertake to confine your answer to the question.

(The question was read.)

A. No.

Q. (By Mr. Graff.) Did he give to you at the time that he asked you to prepare his 1945 tax return for him all of the information that was necessary for you to make up a true and correct return for him for the year 1945?

Mr. Landrum: That is objected to as calling for a conclusion of the witness.

Mr. Graff: This is cross-examination, Your Honor.

Mr. Landrum: Just a moment, if the Court please.

The Court: Well, it calls for a conclusion.

The best this witness can do would be to give his opinion.

Q. (By Mr. Graff.) Well, what is your opinion, Mr. Weinstock?

Mr. Landrum: I am going to object to that, if the Court please. He is asking this witness to give his opinion with relation to the very fact of what we are trying in this case.

The Court: I intended to say that his witness could give his opinion to the other question. I did not say it would be proper to do so. Is there an objection?

Mr. Landrum: Yes, Your Honor.

The Court: The objection is sustained.

Q. (By Mr. Graff.) You were asked on direct examination whether Tom Banks furnished you any personal account books and your answer to that question on direct examination, according to my notes, was that he did, and let me ask you this question: Did he furnish you with the information necessary for you to make up his tax return?

A. Everything excepting information that I got from the other sources.

Q. Yes. So with the information that you got from other tax returns, from other sources, you were able to make up his tax return?

A. Yes, sir.

Q. Now, I am talking only about the 1945 tax return. Have you had occasion, Mr. Weinstock, since these matters have arisen, to re-examine your office copy of his 1945 tax return?

A. Yes, sir.

Q. Mr. Weinstock, I hand you Government's Exhibit 9, which has been identified as his 1945 tax return, and let me ask you this question: In the light of any and all information which may have come to your attention since the 1945 tax return of Tom Banks has been filed, has there been any information which came to you which would cause you to change in any respect any figure in the 1945 tax return of Tom Banks as prepared by you?

Mr. Landrum: That is objected to, if the Court please, first upon the ground and for the reason it is not proper cross-examination; second, we are concerned with the tax return which was filed for 1945. Any information which he had since then certainly is not material either.

The Court: Now, Mr. Reporter, read that question. It is all right down to a certain point and then I think counsel probably went a little too far. Just read it.

(The question was read as follows: "Question: Mr. Weinstock, I hand you Government's Exhibit 9, which has been identified as his 1945 tax return, and let me ask you this question: In the light of any and all information which may have come to your attention since the 1945 tax return of Tom Banks has been filed, has there been any information which came to you —.")

The Court: "Which came to you —" and there you may stop. The rest of the question is calling for a conclusion and is improper. "Came to you —." Question.

Mr. Graff: I am sorry, I did not understand the ruling of the Court.

The Court: I just eliminated the last several words of the question.

Mr. Graff: I see. Thank you, Your Honor.

The Court: Read it, Mr. Reporter, again, so there will be no question that counsel and the witness will understand just what the Court has done.

(The question was read as follows: "Question: Mr. Weinstock, I hand you Government's Exhibit 9, which has been identified as his 1945 tax return, and let me ask you this question: In the light of any and all information which may have come to your attention since the 1945 tax return of Tom Banks has been filed, has there been any information which came to you —?")

Mr. Landrum: Just a moment, if the Court please. I want to renew that objection. It is not proper cross-examination. It may be possible that counsel might be permitted to ask that question if this man was his own witness, but he is not.

The Court: Well, we will permit an answer. You may answer.

The Witness: I do not know, Your Honor, just what position the question is in now. If I can —

The Court: Well, you have heard it about three times. Read it again, Mr. Reporter.

(The question was read as follows: "Question: Mr. Weinstock, I hand you Government's Exhibit 9, which has been identified as his 1945 tax return, and let me ask you this question: In the light of any and all information which may have come to your attention since the 1945 tax return of Tom Banks has been filed, has there been any information which came to you — ?")

A. I would say there has been no information came to me that would —

Mr. Landrum: Just a moment. He has answered it when he said there has been no information came to him.

The Court: That is correct. You may stop there.

The Witness: All right.

The Court: In other words, you have not obtained any additional information about the tax liability since those returns were made?

The Witness: That is right, sir.

The Court: I think that is a fair question to be asked in this case.

Q. (By Mr. Graff.) Now, you have prepared the tax returns for Tom Banks for the years 1946, 1947, 1948, 1949, 1950, and 1951?

A. Yes, sir.

Mr. Landrum: Just a moment, if the Court please. At this time, if the Court please, the Government respectfully withdraws from the record in this case Government's Exhibits 12, 13, 14, and 15, and asks that they be stricken from the record. If Your Honor please, those are income tax returns for the years subsequent to this indictment, being 1948, 1949, 1950, and 1951. The Government now withdraws those exhibits and asks that they be stricken.

Mr. Graff: If the Court please, I do not know whether this is the proper time for the plaintiff's counsel to now start withdrawing exhibits from evidence, but may I suggest and point out the impropriety of interrogating this witness when these exhibits are in evidence and then when this witness is turned over for cross-examination, to then attempt to withdraw the exhibits so that I may not cross-examine this witness with respect to them?

Mr. Landrum: Well, if Your Honor please, I am going to object to the question then that it is not proper cross-

examination because I did not ask him a single word about those exhibits.

Mr. Graff: I beg to differ with counsel. He asked this witness on direct examination whether he did not prepare the tax returns for Tom Banks for the years 1942 to 1951.

The Court: Well, I think that was the question. You are moving to strike from the record the returns for the years 1948, 1949, 1950 and 1951?

Mr. Landrum: Yes, Your Honor.

The Court: Well, you offered them and they were received. You have a right to make that motion. It is your conclusion now that they are not competent evidence in this case? I will put it this way: That there may be a question as to the competency of that evidence in this case?

Mr. Landrum: I have had them carefully examined and it is my opinion that they are immaterial and that they are not competent evidence in this case.

The Court: Well, they have not been submitted to the jury or read to the jury. The motion is sustained and the exhibits are stricken from the record in this case, and if any knowledge contained in those exhibits has come to the attention of the jury, you may disregard it entirely in this case.

Is there any further examination of this witness?

Mr. Graff: Yes, there is a question pending.

The Court: What is the question, Mr. Reporter?

(The question was read.)

A. The answer is yes.

Mr. Landrum: I move that the answer be stricken in order that I may interpose an objection.

The Court: Well, the answer may be stricken for an objection.

Mr. Landrum: Objected to upon the ground it is not proper cross-examination.

The Court: The answer may remain in the record. It is perhaps immaterial in a measure, but I think harmless. You may proceed.

Mr. Graff: I do not want to labor the point on that last question, Your Honor, but I have a distinct recollection that the same question was asked on direct examination, so I assume that I would have the right to inquire about it on cross-examination.

The Court: Well, I permitted the question and the answer.

Mr. Graff: Yes, Your Honor.

Q. (By Mr. Graff.) Mr. Weinstock, in connection with the preparation of the 1946, 1947, 1948, 1949, 1950, and 1951, tax returns of Tom Banks, has there been any information which has come to you which would cause you to change any of those tax returns in any degree?

Mr. Landrum: That is objected to. We are not concerned with '48, '49, '50 and '51.

The Court: Well, the returns for those years may be eliminated because it has been stricken from the record in this case.

Mr. Graff: May the answer then as to those years be eliminated?

The Witness: As to '46 and '47, no.

Mr. Landrum: All right.

Q. (By Mr. Graff.) Mr. Weinstock, if you had now — in connection with the preparation of tax returns by you for Tom Banks, did he rely upon you to prepare his returns for him —

A. Yes, sir.

Q. Properly?

A. Yes, sir.

Q. And did you in preparing the tax returns for Tom Banks attempt to prepare them properly?

A. Yes, sir.

Q. Did you, to the best of your knowledge and belief, and information, prepare them properly?

A. Yes, sir.

Q. Is it not a fact, Mr. Weinstock, that Mr. Banks entrusted you implicitly in the preparation of his tax returns?

Mr. Landrum: Just a moment. That is objecetd to, if the Court please. It calls for a conclusion of the witness and he certainly does not know what was in Mr. Banks' mind.

The Court: The objection to that question is sustained.

Q. (By Mr. Graff.) Is not it a fact, Mr. Weinstock, that on numerous occasions Mr. Banks would sign the tax returns in blank and request you to complete them for him?

A. Yes, sir — not numerous, — I think a couple of times, a couple years.

Q. He relied on you to make the tax returns and make them true and accurate?

Mr. Landrum: Just a moment, if the Court please. Now, that is objected to upon the ground and for the reason that it is misleading, that it is not proper cross-examination, that it calls for a conclusion of the witness.

The Court: It might, I think, be objectionable, counsel. The question before that, there might have been some question about it, but there was no objection and I permitted the answer.

Q. (By Mr. Graff.) In connection with the preparation of the tax returns for Tom Banks, did he ever withhold any information from you to your knowledge?

A. To my knowledge, no.

Q. Did he ever refuse to furnish you with any and all information that you may have requested from him in connection with the preparation of his tax returns?

A. No, sir, he did not refuse.

Q. After the returns were prepared and signed, did you then cause them to be filed with the Collector's Office?

A. I caused them to be mailed to the Collector's Office.

Q. Yes. Would you mail them to the Collector's Office together with — did you also mail the remittance with them?

A. If there was a remittance required, yes.

Q. In some instances the tax had already been pre-paid?

A. That is right.

Q. So that was not necessary to send a remittance with the return?

A. That is right.

Q. Yes. So if on the basis of the declaration of income the tax had already been paid, then, of course, there would be no remittance accompanying it?

A. That is right.

Q. And if a portion had been previously paid by payments on declaration, then the balance of the tax due would then be transmitted with the tax return that you would mail?

A. That is right.

Q. Mr. Weinstock, did you at the time of making tax returns, make tax returns for a lot of people?

A. A great number of people.

Q. You were not only making tax returns for Tom Banks?

A. Oh, no.

Q. Could you tell us approximately in the course of an average year's business about how many different tax returns you would make for other people?

A. Oh, I would say total tax returns coming out of our office would be between four and five hundred. That, including businesses and individuals and so forth.

Q. And now, Mr. Weinstock, I think you told us originally that you have been in the accounting business, I think, since 1920?

A. 1920 I started.

Q. That would be a period of 32 years?

A. That is right.

Q. During the period of 32 years, I take it, that you have acquired a certain amount of knowledge and skill in matters of accounting and in tax matters?

A. I feel so.

Q. And you maintain an office in Minneapolis in the Plymouth Building, which office you are in charge of?

A. Yes, sir.

Q. In connection with that office you maintain a staff of people who work generally under your supervision and direction?

A. Yes, sir.

Q. In your office as a part of the help that you have working under your supervision and direction, do you have also a certain amount of so-called "GI" training?

A. Yes, sir.

Q. Where people are trained under your direction under the so-called GI Bill?

A. I have trained a number of ex-servicemen.

Q. These are ex-servicemen that are trained by you?

A. Yes, sir.

Q. So that as a result of the training and experience that you have acquired over a period of some 32 years, you have acquired a certain amount of skill and practice in tax and in accounting matters?

A. Yes, sir.

Q. And you hold yourself out as a person who is competent to qualify as a person to assist other persons in making their tax returns and making the tax returns for them?

A. Yes, sir.

Q. And you acted in that capacity for Tom Banks in making his tax returns commencing with the year 1942?

A. Yes, sir.

Q. Mr. Weinstock, coming back to the cashier's checks which came to you from the Hennepin State Bank, and which are identified as the checks starting with Exhibit 117, I asked you whether Tom Banks told you to pay over the proceeds to him and your answer to that question was "No"?

A. Yes, sir.

Q. Who did tell you what to do with the proceeds of those checks?

A. Mr. Mitch, Herman Mitch.

Q. What did he tell you with respect to those checks?

Mr. Landrum: Just a moment, if the Court please. That is objected to. It is not proper cross-examination, no foundation laid, no showing who Herman Mitch is.

The Court: That is not competent, counsel.

Mr. Graff: If the Court please, on direct examination counsel asked him concerning the checks covered by Exhibit 117 and particularly asked him about a check for $5,000.00 payable to Len Welsh. He asked him concerning those funds, whether they came out of the Donnelly fund, so I think the subject matter went into was gone into on direct examination.

The Court: Read the question, Mr. Reporter.

Mr. Graff: According to my notes, this question was asked and this answer was given. "I was told to turn over the proceeds of the Donnelly trust account to Tom Banks."

The Court: Aren't you asking this witness to tell what somebody else told him?

Mr. Landrum: Yes, Your Honor, he is.

The Court: Read the question, Mr. Reporter.

(The question was read.)

Mr. Landrum: Objected to as hearsay and not proper cross-examination.

Mr. Graff: The subject matter was gone into on direct examination, Your Honor, as to what should be done with those particular funds and that is the reason I am following it up.

The Court: You are asking this witness to tell what somebody else told him, which would be purely hearsay.

Mr. Graff: Well, the question was asked him on direct examination what he was supposed to do with those funds.

The Court: Well, he said Herman Mitch told him what to do with the funds.

Mr. Graff: Yes.

The Court: Now, you are asking what Mitch told him. That is hearsay. It is incompetent. I will have to sustain the objection.

Mr. Graff: All right, Your Honor.

Q. (By Mr. Graff.) After I ask this question, Mr. Weinstock, please wait a moment or two in the event there should be an objection. Who was Mr. Mitch?

Mr. Landrum: Just a moment, if the Court please. Now, counsel is going through the back door.

The Court: Well, I will permit an answer to that question. You have told who told you what to do with the money, — it was Herman Mitch?

The Witness: Yes, sir.

The Court: Who was he?

The Witness: Herman Mitch was the previous officer and manager of the Casablanca, Incorporated.

Q. (By Mr. Graff.) Please do not go into any conversation that you may have had with Herman Mitch or anyone

else. Did you, in accordance with the instructions of Mr. Mitch, pay out the money that was in these cashier's checks in the so-called 117 group?

A. Yes, sir.

Q. Now, Mr. Weinstock, I asked you some questions this morning concerning the 1945 tax return of Tom Banks. Now, let me ask you this question with respect to his 1946 tax return, identified as Government's Exhibit 10. At the time that you prepared the 1946 tax return for Tom Banks, did he, to the best of your knowledge, withhold any information from you which you might need in making up his 1946 tax return?

Mr. Landrum: If the Court please, that is objected to. I might say that so far as we are concerned, we are perfectly willing to stipulate that this witness put in everything that Mr. Banks told him.

The Court: Well, I thought the ground had been thoroughly covered.

Mr. Graff: I checked with the reporter, Your Honor, to make sure whether I had asked the question as to only 1945 or also '46 and '47. I find that I had only asked it as to '45. Now, if I may be permitted to ask one general question, I can shorten this a good deal.

The Court: You may proceed.

Q. (By Mr. Graff.) Mr. Weinstock, this morning I asked you certain questions concerning the '45 tax return of Tom Banks. You recall those questions?

A. Yes.

Q. Now, would your answers to those questions be the same if I had asked you concerning 1946 and 1947 tax returns?

A. Yes.

Q. Mr. Weinstock, I hand you Government's Exhibit 9, and direct your attention to the lower part of the exhibit where the date of the return is inserted.

A. The date on which I signed the return?

Q. Well, there is a date between where you signed it and where Tom Banks signed it?

A. Yes, sir.

Q. Yes. And that date was?

A. January 11, 1946.

Q. Is that in your handwriting?

A. Yes, sir.

Q. After you signed the return, Government's Exhibit 9, what did you do with it?

A. Mailed it to the Collector of Internal Revenue.

Q. On what date did you mail it to the Collector of Internal Revenue?

Mr. Landrum: That is objected to, if the Court please, as no foundation laid. How does he know what date he mailed it?

Mr. Graff: Well, let us have him tell us whether he knows or not.

The Court: You may ask him that.

The Witness: I mailed it the day it was signed and dated.

Q. (By Mr. Graff.) So you mailed Government's Exhibit 9 on January 11, 1946?

A. Yes, sir.

Q. Mr. Weinstock, I direct your attention to Government's Exhibit 145. That has previously been identified as a power of attorney, executed by William Donnelly to you. And under that power of attorney, you were given authority, were you not, by William Donnelly to disburse the funds which would come into your possession under the power of attorney from William Donnelly, is that correct?

Mr. Landrum: The exhibit speaks for iself, Your Honor.

A. Yes, sir.

The Court: That is all right.

Q. (By Mr. Graff.) And did you pursuant to the authority in that power of attorney, Government's Exhibit 145, disburse those funds?

A. Yes, sir.

Q. Did you, pursuant to the power of attorney in Exhibit 145, deposit those checks in your trustee account at the Lincoln Branch of the Northwestern State Bank?

A. Yes, sir.

Q. In Government's Exhibits 9, 10, and 11, representing the '45, '46 and '47 tax returns of Thomas Banks, there are certain sheets, typewritten sheets, containing different matters?

A. Yes, sir.

Q. Were those prepared in your office under your direction and supervision?

A. Yes, sir.

Q. Mr. Weinstock, directing your attention to Governments' Exhibit No. 9, and to a typewritten sheet contained therein, under the heading of "Recapitulation," is an item labeled "Miscellaneous income, fees and commissions, $2,000.00." Now, if you will hold that before you, and I direct your attention to a sheet in Government's Exhibit 10, a separate typewritten sheet, also labeled "Miscellaneous income, $2,000.00," and then I direct your attention to Government's Exhibit 11, to a separate typewritten sheet in that tax return entitled, "Miscellaneous Commissions and Fees, $2,000.00."

A. Yes, sir.

Q. Could you please explain to us what those items are to represent, or the purpose of those particular items?

A. The purpose of them was to cover anything that Mr. Banks could not specify as from any particular source, — sort of a "cover-all," should I say, of anything that he might have omitted.

Q. So that it might cover anything that could have been overlooked?

A. That is right.

Mr. Graff: I have no further questions.

Redirect Examination

By Mr. Landrum:

Q. Mr. Weinstock, I believe you told us that you were the trustee in connection with the liquidation of Casablanca, Incorporated, have you not?

A. No, sir, I did not. It might be so construed in an indirect way.

Q. Yes. Well, you did have to do with the liquidation of Casablanca, didn't you?

A. I had to do with the liquidation of merchandise in which the Casablanca still had an equity.

Q. Yes, sir. And, of course, where are the books and records of the Casablanca, Incorporated?

A. I do not know.

Q. Were they destroyed?

A. I do not know.

Q. Did you have them in your possession?

A. At one time, yes, before I moved my office.

Q. What did you do with them?

A. I do not know. I have made a search for them and I could not find them.

Q. You have been asked to produce those books and records, have you not?

A. Yes, sir.

Q. As a matter of fact, was not there something in connection with a fire at the Casablanca?

A. No, there was some—it changed hands two or three times and I do not know whether the books were still in there at the time or whether they were — I moved my office in '46 and I do not know —

Q. It changed hands two or three times and then there was a fire and you do not know where the books went, is that right?

A. I do not recall of there being any fire.

Q. Well, at any event, do you have any records with you here which shows the original capital investment in Casablanca?

A. I have work papers — my work papers.

Q. Yes, and will you tell us what the original Casablanca investment was in '43?

Mr. Graff: Just a moment. I will object to that on the ground that it is improper redirect examination, not covered in either the course of direct or the cross-examination, and on the further ground it is irrelevant and immaterial to the issues, triable issues in this case.

The Court: The objection is overruled.

Q. (By Mr. Landrum.) Will you state the figure, please?

A. The capital stock investment was $15,000.00.

Q. State whether or not it was the same at the time of liquidation?

A. It remained the same.

Q. What was that date?

A. Well, this has never been legally liquidated.

Q. Now, how do you know that you mailed this return on the 11th day of January, 1946?

A. Because I always — the last thing I do is sign them and the envelopes are prepared and ready for mailing when I sign the returns and they are put in the mail immediately.

Q. That has been six or seven years ago, hasn't it?

A. Yes, sir.

Q. Has anyone discussed with you recently the date on which you mailed that return?

A. I believe Mr. Graff asked me —

Q. (Interposing.) Yes. When did he ask you that?

Mr. Graff: Just a moment. I will object to that as being immaterial.

The Court: You may answer.

A. I think about a week ago.

Q. (By Mr. Landrum.) Yes. As a matter of fact, you have discussed this matter with Mr. Graff and the other gentlemen, at least the accountant who sits over there, several times, have you not?

A. No, sir, not several times.

Q. Well, at any event about a week ago Mr. Graff asked you to refresh your recollection with relation to when you mailed that return, didn't he?

Mr. Graff: Just a moment. I will object to that question on the ground it is leading, suggestive, repetitious, —

The Court: Objection is sustained.

Q. (By Mr. Landrum.) Now, where is Herman Mitch?

A. I understand he is dead.

Q. You know he is dead, do you not?

Mr. Graff: Just a moment. I will object to that as being argumentative.

The Court: You may answer that question.

A. I do not know what you mean by "I know." I know his son told me he was dead.

Q. (By Mr. Landrum.) Herman Mitch is dead?

A. I did not attend his funeral. I have never seen anything in the papers excepting the son came to me and told me that he was dead.

Q. Yes. And how long has it been since you have known that Herman Mitch was dead?

Mr. Graff: Just a moment, Your Honor. I will object to it on the ground it is irrelevant and immaterial.

The Court: The objection is sustained.

Q. (By Mr. Landrum.) In any event, I would like to ask you this question: You stated here, did you not, on cross-examination that a man by the name of Herman Mitch had told you to deliver this money to Mr. Banks?

A. Yes, sir.

Q. And according to your information, Herman Mitch is dead?

A. Yes, sir.

Q. And according to your information, how long has he been dead?

A. Since about —

Mr. Graff: (Interposing.) I will object to that on the ground of repetition.

The Court: You may answer; possibly it may have some bearing.

A. About two or three years ago.

Q. (By Mr. Landrum.) About two or three years ago.

Mr. Landrum: That is all.

Mr. Landrum: Now, if the Court please, I am very happy to say to the Court that we have arrived at a stipulation, which I think will relieve us of some time in the introduction of evidence in this case, and with the Court's permission, I desire to read it into the record, and in reading it I desire to say that counsel for the defendant have requested me to say to the Court that they have signed the stipulation, subject only to its relevancy. In other words, they retain the right, if they so desire, to object upon the ground of relevancy.

The Court: Very well.

Mr. Landrum: (Reading.)

"It is hereby stipulated and agreed by and between the parties to this action that during the five-year period beginning January 1, 1937, and ending December 31, 1941, Thomas W. and Reta L. Banks paid total federal income taxes of $6,409.61, and that during each of the following six years Thomas W. and Reta L. Banks paid federal income taxes in the following amounts:

Year	Amount Paid
1942	$ 267.66
1943	17,366.35
1944	3,639.71
1945	131.17
1946	5,482.44
1947	9,565.66

Dated: May 24, 1952.

/s/ PHILIP NEVILLE
/s/ C. U. LANDRUM
/s/ MILES W. LORD
Attorneys for Plaintiff

/s/ A. JEROME HOFFMANN
/s/ JOHN W. GRAFF
/s/ RICHARD E. KYLE
Attorneys for Defendant"

Mr. Graff: Now, if the Court please, that information, as I understand it, is to cover the information which would otherwise have been contained in Exhibit 201.

Mr. Landrum: Yes, and that is what I have got this note about. I want to withdraw Exhibit 201. It has never been received, but we had it marked, and we would like to withdraw Exhibit 201.

The Court: The stipulation covers the facts?

Mr. Landrum: Yes, Your Honor.

Mr. Graff: Exhibit 201 was not received at all, Your Honor, and so this takes its place.

The Court: Well, you desire to withdraw Exhibit 201?

Mr. Landrum: Yes, Your Honor.

The Court: Very well.

Whereupon HOWARD W. MELBOSTAD, was recalled as a witness and, having previously been duly sworn, testified further as follows:

Mr. Lord: Your Honor, I believe, if the Court please, that subsequent to the time Mr. Melbostad was on the stand, the Government made certain inquiries of the witness who was on the stand and who had charge of the books and rec-

ords of Music Installations, Inc., and we believe that that witness' answers to the questions concerning the whereabouts of the books of Music Installations, Inc., have laid a sufficient foundation for the introduction into evidence of Government's Exhibit 214, which is a transcript of the books and records of that corporation made by Mr. Melbostad while the books were in existence, and so at this time, Your Honor, we re-offer into evidence Government's Exhibit 214.

Mr. Graff: If the Court please, my notes indicate that Mr. Weinstock was asked something concerning the books and records of Music Installations, Inc. He stated that he saw some books a couple of years ago and, as far as he knew, the books had been turned back to Mr. Shepard, and the book that he saw about two years ago was a ledger. Now, those are my notes of it and I submit they do not establish the necessary foundation for the introduction of secondary evidence.

Mr. Lord: If the Court please, I believe the record will show a return "Not found" for Mr. Shepard when the Marshal tried to serve him and that, as far as our information discloses, the other shareholder in that corporation was Mr. Banks, and therefore we do not need to offer any further evidence on this subject as far as laying a foundation for secondary evidence. If the books are in the hands of the defendant, he has them to cross-examine us on our secondary evidence.

The Court: Who had these books the last time—

Mr. Lord: Mr. Weinstock is the last man we know of who had the books. Other than that our inquiries have petered out. We don't know where they are and we have been frustrated in every attempt to obtain these books and other books, Your Honor.

Mr. Graff: Just a moment. I object to that statement, Your Honor.

The Court: Yes.

Mr. Lord: I withdraw it. I apologize.

The Court: What did Weinstock say he did with them, or what does he know about that?

Mr. Lord: As I recall, I believe Mr. Graff's statements are about correct. Mr. Weinstock once saw the books and he does not know where they are.

Mr. Graff: According to my notes, he saw the ledger—the reporter's record, of course, would be much more accurate than my notes—but my notes are that he saw some books a couple of years ago. He mentioned the ledger, specifically. He said he turned them over to Mr. Shepard. Now, that is what I think he testified to in substance.

Mr. Landrum: If Your Honor please, the Court will take judicial notice of its own record, and there was a subpoena duces tecum, as I understand the issues, for Mr. Shepard to produce these books and the Marshal has been unable to find him.

The Court: Where does he live, do you know?

Mr. Lord: He has two or three residences, as far as we are able to ascertain, Your Honor,—one at Osseo, Minnesota, one at Lake Minnetonka, and the Marshal has been to all those places and I believe the record shows a return "Not found" for Mr. Shepard, and we have had some difficulty in locating the business address of that corporation or finding anyone there who is competent to take service.

Mr. Graff: Let me ask this question: Has the subpoena which is directed to Mr. Shepard asked for the books of Music Installations, Inc.?

Mr. Lord: I believe that it does.

Mr. Graff: Well then, if that is the case, I don't see how they can claim they have established the foundation for Mr.

Weinstock now introducing secondary evidence, if they had the information that Shepard had the books.

Mr. Lord: Your Honor, we have been forced to look where ever we could.

The Court: Well now, let's terminate this discussion. As I understood counsel for the Government, you propose to prove that a transcript was made of certain records of Music Installations, Inc.?

Mr. Lord: Yes, Your Honor.

The Court: You may proceed.

Mr. Lord: We have offered in evidence, Your Honor, Government's Exhibit 214.

The Court: Has it been shown what Exhibit 214 is?

Mr. Lord: Yes, Your Honor, the witness earlier testified, if you recall, that he made a transcript of these certain books and records in 1946.

The Court: And that is Exhibit 214?

Mr. Lord: Yes, Your Honor.

The Court: When was that transcript made?

Mr. Lord: I believe he stated in the fall of 1946, Your Honor.

The Court: (To the witness) Is that correct?

The Witness: That is correct.

Mr. Lord: My purpose in bringing the witness back, Your Honor, is to further explain this in the event that the Court sees fit to accept it into evidence.

The Court: Let me see the exhibit.

(Government's Exhibit 214 handed to the Court.)

(Document handed to Mr. Hoffmann by the Clerk.)

Mr. Lord: I have asked for that exhibit, if Your Honor please.

The Court: Don't act like children.

Mr. Lord: Yes, Your Honor.

The Court: (To Mr. Hoffmann) You may examine that document. When you get through, hand it to Government counsel.

Mr. Hoffmann: I shall be most happy to do so, Your Honor.

Mr. Graff: May we have a moment, Your Honor, while we examine this subpoena?

The Court: Yes.

Mr. Graff: May I state my objections now to the exhibit, Your Honor?

The Court: You may.

Mr. Graff: With respect to Exhibit 214, we object to the reception of Exhibit 214 into evidence on the ground and for the reason that it appears that that exhibit is something which this witness copied from some books. There has been no showing here that the books from which it was purported to have been copied are not in existence, and therefore we submit that secondary evidence is not admissible. The objection is further made that the exhibit is hearsay and is immaterial and irrelevant.

The Court: (To the witness) Did you make Exhibit 214?

The Witness: I did, Your Honor, yes.

The Court: Was it in connection with your work of investigation?

The Witness: Yes.

The Court: Did you copy it from the books and records of Music Installations, Inc.?

The Witness: Yes,—from a ledger of Music Installations, Inc.

The Court: Did you copy it accurately?

The Witness: I believe I did.

Mr. Hoffmann: I didn't get the answer, Your Honor—

The Witness: I said I believe I did.

The Court: I asked him if he copied it accurately; he says he believes that he did. Is that the question you wanted to know about?

Mr. Hoffmann: I didn't get his answer to that question, Your Honor.

The Court: Very well. (To the witness) Did you have possession of the books of this concern at that time?

The Witness: I examined the books, yes.

The Court: That was in 1946, do I understand?

The Witness: Yes.

The Court: And you took the data and made this document, Exhibit 214, from the books and records of the concern?

The Witness: Yes. This exhibit was copied from the capital stock account and the surplus account of the books of Music Installations, Inc.

The Court: Who had custody of the books and records at that time?

The Witness: These books were furnished to me by Miss Jessie Beshears at 1316 Nicollet Avenue, Minneapolis.

The Court: Was that the place of business of this concern at that time?

The Witness: I believe it was. That is where the books were when I examined them.

The Court: Was Miss Beshears connected with the concern, so far as you know?

The Witness: I believe she was. She was the one that permitted me to examine the books.

The Court: And you left them with her?

The Witness: Yes.

The Court: And you do not know where they are now?

The Witness: No. After I finished with them, they were left right where they were when I got them, in the same building.

The Court: You haven't seen them since?

The Witness: No.

The Court: Now, counsel, do I understand that these books went into the hands of Harry Shepard?

Mr. Lord: Yes, Your Honor. I understand he was an officer of that corporation, along with the defendant.

The Court: Well, a subpoena was issued by him?

Mr. Lord: Yes, it was, Your Honor.

The Court: (Continuing) To appear and bring the books and records of that concern?

Mr. Lord: Yes, Your Honor.

The Court: It has not been served?

Mr. Lord: No, Your Honor. There was a return "not found" on it, Your Honor, and the subpoena has been outstanding for some time.

The Court: (To the witness) You produced Exhibit 214, did you?

The Witness: You mean, did I bring it into court? Is that what you mean?

The Court: Well, you made it?

The Witness: I made it originally, yes.

The Court: Have you kept it—

The Witness: No, I turned it over, turned it in at my office with the tax returns of Mr. Banks and other papers and—

The Court: You mean into the office of the Collector of Internal Revenue?

The Witness: Yes, to my superior.

The Court: It has been held in that office, so far as you know?

The Witness: Yes.

The Court: You don't know who produced it in court?

The Witness: No, other than it was with all the other papers in the case.

The Court: Well, you know you made this exhibit, 214?

The Witness: I know I made it.

The Court: Well, it is received.

Mr. Lord: You may examine, counsel.

Cross-Examination

By Mr. Graff:

Q. What books did you examine of Music Installations before you wrote up Exhibit 214?

A. The ledger,—general ledger.

Q. Do any of the entries on Government's Exhibit 214 refer to the years '45, '46, or '47?

(Government's Exhibit 149 as previously marked, now marked in addition 149-A, to 149-M, inclusive; Government's 152 as previously marked, now marked in addition 152-A to 152-I, inclusive; and Government's Exhibit 153 as previously marked, now marked in addition 153-A, 153-B, and 153-C.)

(Government's Exhibit 159, which was previously marked, now had added thereto, 159-A to 159-I, inclusive.)

(Government's Exhibits 216 and 216-A marked for identification.)

(Government's Exhibits 217 and 217-A marked for identification.)

(Government's Exhibit 148 as previously marked was in addition thereto marked as 148-A and 148-B for identification.)

(Exhibits 150, 160, 159, 159-A through 159-I, 153, 153-A, B and C, 147, 216, 216-A, 217, 217-A, 146, 148 and 148-A and 148-B are offered in evidence.)

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 26, 1952. Appearances are as has been heretofore noted.

Monday Morning Session, May 26, 1952, 10:00 o'clock A.M.

(Appearances as heretofore noted.)

Mr. Lord: If the Court please, at this time, I should like to withdraw certain exhibits which were previously offered and which, upon further examination the Government found not to be relevant at this time. These exhibits are Government's Exhibits 154, 155, 156, 157, 158, and 151.

Now, if the Court please, on our last session here the Government offered in evidence certain pages of Exhibit 149, marked as 149-A, 149-B, through 149-M, and I believe there are others here that I will go on to list, and the understanding was that counsel for the defendant was to have an opportunity to examine them and at this time I would like to re-offer them, and I would list them, if the Court please.

The Court: 149 and 149-A to M, inclusive.

Mr. Lord: Now, Government's Exhibit 152, which is a large book on the Blue Goose, and 152-A, -B to -I, inclusive, is now offered in evidence, Your Honor.

Government's Exhibits 153 and 153-A, -B and -C, are now re-offered if the Court please. Exhibit 150, which was offered in its entirety, we offer, 160 we re-offer, 159-A, -B, -C, through -I, we re-offer. 147 is offered in its entirety. 148, Your Honor, is re-offered, 148-A and -B are re-offered, Your Honor.

Government's Exhibits 216-A and 217 and 217-A are re-offered.

Mr. Graff: With respect to the exhibits which counsel has just referred to, Your Honor, I think probably the easiest way to handle it would be to indicate to the Court as we did on Saturday last that we had no objection to the foundation with respect to all of these exhibits. We do, however, wish to make our objection on the ground of their being irrelevant and immaterial. I appreciate the fact that the Court is relying upon counsel, indicating that they will connect it up. However, this morning there were a whole group of exhibits which were withdrawn. Now, we should like to have reserved to us the right to interrogate whatever witnesses may appear with respect to these exhibits, and go into the question of their materiality and their relevancy, and if it should later appear that they are not material and relevant, to move the Court to strike them from the record.

The Court: Very well. The first numbered exhibits that are offered this morning, I believe begin with Exhibit 146. I think that relates to the Flour City Body Corporation affairs,—146, 147, and 149, and 149-A to -M, inclusive, are received. 148-A and 148-B are received.

The next group of exhibits I think relate to the Blue Goose and associate matters numbered Exhibits 150, 152, and 153, 153-A, -B and -C.

152-A to -I, inclusive, those exhibits are received, those I named, except 151,—with the exception of those withdrawn by counsel for the Government.

I understand Exhibits 154, 155, 156, 157, and 158 are withdrawn. Exhibits 159 and 160 are received. I believe that covers the offers made at this time, except we have 216, 217 and 217-A. I believe they were offered.

Mr. Lord: Yes, Your Honor. They relate to the Flour City Body Corporation. May I inquire as to whether or not you have ruled on 153-A, -B, and -C, Your Honor? We have re-offered that, too.

The Court: Those exhibits are received.

Mr. Lord: Now, Your Honor, with respect to Exhibit 159, Your Honor, that had sub-numbers -A through -I, and I believe the Court may not have mentioned those sub-numbers when you admitted that exhibit.

The Court: They are received.

GEORGE H. MCKUSICK, was recalled as a witness and, having previously been duly sworn, testified further as follows:

Direct Examination

By Mr. Lord:

Q. You are the Mr. McKusick who testified here before under oath, are you not?

A. I am.

Q. Now, Mr. McKusick, you stated that you made certain investigations with reference to Mr. Banks' affairs, did you not?

A. I did.

Q. In the course of your investigation did you have occasion to refer to the books and records of the firm Banks & Shepard?

A. I did. I made an examination—

The Court: Proceed.

Q. Now, where did you see these books?

A. I made a request of the accountant L. H. Weinstock, and he stated that he did not —

Mr. Graff: Just a moment. We object to anything that Mr. Weinstock may have stated to this individual on the ground that it is hearsay and not responsive to the question which was asked.

The Court: The objection is sustained.

Q. (By Mr. Lord) Where did you see the books, Mr. McKusick?

A. They were brought to my office at 208 Builders Exchange.

Q. And who brought them there? A. L. L. Peterson.

Q. Did you examine them? A. I did.

Q. About what date was that, Mr. McKusick?

A. '49 or '50.

Q. What did your examination consist of?

A. I was particularly concerned with the—

Mr. Graff: Well, just a moment. I do not care to have the witness characterize his testimony, Your Honor.

The Court: Just tell what examination you made, what you examined.

Q. (By Mr. Lord) What did you look at?

A. Rita L. Banks' investment account.

Q. Did you find Rita L. Banks' name in the investment account?

A. I did.

Q. What did you do with the books?

A. I had the sheets which were Rita L. Banks' investment account photostated.

Q. Where did that photostating take place?

A. In the Government office in St. Paul.

Q. Did you have occasion to compare those photostats with the original books?

A. I did.

Q. How many sheets did you have photostated?

A. Two.

Q. Were there other sheets that had to do with the investment account of Rita Banks?

Mr. Graff: Just a moment. I will object to that on the ground it is immaterial as to what Rita Banks may have had. This case concerns Tom Banks, as I understand it.

The Court: You may answer.

The Witness: Repeat the question, please.

Mr. Lord: Would you read the question, Mr. Reporter.

(The question was read.)

Mr. Graff: Just a moment. Just in the event, Your Honor, that there should be further questions as to Rita Banks, may we have a standing objection as to the incompetency and irrelevancy of such testimony without the necessity of taking it each time her name is mentioned?

The Court: That is agreeable to the Court. There is a question pending, I believe, is there? You may read it, Mr. Reporter.

(The question was re-read.)

A. Yes.

Q. (By Mr. Lord) Did you make a computation of the investment account of Rita Banks?

A. Yes.

Q. (By Mr. Lord) What pages did you refer to in making that computation?

A. The page which carried the balance for the calendar year ending 1941, and the page which carried the balance for the calendar year ending 1942.

Q. Were they the pages which you photostated?

A. They were.

Q. And what were the other pages? What years were they concerned with?

A. The years subsequent to the period of my investigation.

Q. And by that you mean what?

A. '48 and '49—part of it.

(Government's Exhibit 218, consisting of two sheets, marked for identification.)

Q. Mr. McKusick, I show you Government's Exhibit 218. Will you tell me what that is?

A. That is a photostatic copy of Rita L. Banks' investment account in the partnership known as Banks & Shepard.

Q. What is the second page on that exhibit?

A. The second page of the exhibit carries the balance for the year—calendar year ending 1943.

Q. And the first page is what years?

A. The first page carries the balance for 1941 and 1942.

Q. Are those the photostats which you prepared—

A. (Interposing) They are—which I had prepared.

Q. Explain that, if you please.

Q. When the Government has photostats made, the employees simply send the material to be photostated to the office in St. Paul and the actual photostating is done under the direction of the St. Paul office.

(Government's Exhibit 219 marked for identification.)

Q. Mr. McKusick, did you make an examination of those books with reference to the balance for the year ending 1943?

A. I did.

Q. State whether or not you prepared a phototstatic copy of the page containing that balance?

A. I did.

Q. I show you Government's Exhibit 219. Will you tell me what that is?

A. That is a photostatic copy of the ledger sheet showing Rita L. Banks' investment account in the partnership Banks & Shepard for the calendar year ending 1944.

Q. Were Government's Exhibits 218 and 219 compared with the original books of the Banks & Shepard partnership?

A. They were.

Q. Did you find them to be accurate reproductions of the figures contained on those pages?

A. I did.

Q. Did the books from which you drew those photostats appear to be—were they given to you as books of the Banks & Shepard corporation?

A. They were.

Q. Partnership, correction. A. They were.

Q. Did they appear to be regular business records?

Mr. Graff: Just a moment. That is objected to as hearsay and not the best evidence.

Mr. Lord: I am asking what they appeared to be.

Mr. Graff: Also asking for a conclusion and not a statement of facts.

The Court: You may answer.

A. I asked for their books of original entry. These books were produced.

Mr. Graff: Well, I move that that is not responsive, Your Honor. I move it go out for that reason.

The Court: The motion is overruled.

Q. (By Mr. Lord) Mr. McKusick, do you know where the books and records of Banks & Shepard are?

A. I do not.

Q. When did you last see them?

A. At the time that I had the photostatic copies prepared.

Q. Do you know who are partners in the Banks & Shepard partnership?

Mr. Graff: Well, just a moment. I presume that that is not the best evidence and it is hearsay as far as this witness is concerned.

The Court: Well, of course, there is better evidence, unquestionably, than that which you are now seeking.

Mr. Lord: If the Court please, I propose to lay a foundation for the introduction of these documents as secondary evidence and my inquiries were to the effect as to where we might obtain the best evidence.

The Court: I think it is incompetent as to the hearsay evidence given by this witness. Proceed.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 218 and 219.

(Exhibits handed to Mr. Graff.)

Mr. Graff: May I have a few moments to examine them, Your Honor?

The Court: Yes.

Mr. Graff: May I ask a few questions, Your Honor, pertaining to the exhibits?

The Court: To the foundation?

Mr. Graff: Yes, Your Honor.

Q. (By Mr. Graff) Mr. McKusick, what did I understand you to identify Exhibit 219 as?

POOR COPY

A. I do not—you would have to show me the exhibit. I do not remember them from their Exhibit number.

(Document handed to the witness.)

A. I believe I identified that as the photostatic copy of the ledger sheet carrying the balance of Rita L. Banks' investment account for the calendar year 1944.

Q. And directing your attention to the top of Exhibit 219, doesn't the word "inventory" appear?

A. The inventory—

Q. (Interposing) Doesn't it? A. It does.

Q. Now, do you know who wrote this in here "net worth investments"?

A. I do not.

Q. Directing your attention to Exhibit 218, the words, the letters, "Inv." also appear, do they not?

A. That is right.

Mr. Graff: Now, if the Court please, at this time we will object to Exhibits 218 and 219 for several reasons. The first is that they appear to be photostats. We submit that before any secondary evidence can be admitted, the necessary foundation has not been laid, at least, not to my knowledge. They are objected to for that reason. They are objected to on the further reason that I think that they have not been described correctly by this witness, and for the further reason that these appear to be all pertaining to Rita Banks. We object to them further on the ground that they are irrelevant and immaterial to the triable issues in this case.

(Documents handed to the Court.)

The Court: Was any effort made to produce the original records in this matter?

Mr. Lord: Yes, Your Honor, we have returns on file of this partnership, Government's Exhibit 24, 25, 26, and 27, showing Rita Banks and Harry Shepard as partners in the Banks & Shepard partnership. We have attempted to sub-

poena Harry Shepard unsuccessfully for some period of time, and we submit that that showing, together with the fact that the books and records of this partnership must be construed to be in the hands of either Mr. Shepard or the wife of this defendant, and they are available to them to produce, and we submit that that should be sufficient foundation for the introduction of this secondary evidence. The agents have diligently searched.

Mr. Graff: If the Court please, there are certain tax returns in here of this partnership. There is no evidence in this record that I know of that shows a continuation of this partnership which counsel apparently assumes. Now, with respect to the question of the secondary evidence, simply to come in court and say, "Well, we have not got it," is not sufficient under the rule as I understand it, and I submit that necessary foundation for the introduction of secondary evidence has not been laid. Now, the Government had these books. Apparently they had them because they claim they were able to make certain photostats, so apparently they were in existence. Now, they have not accounted for the existence, and they have not laid the necessary foundation.

The Court: The exhibits are received.

Q. (By Mr. Lord) Mr. McKusick, in the course of your investigation of this matter, have you had occasion to contact the firm known as the "Coin-A-Matic Amusement Company"?

A. I did.

Q. Did you find where they kept their books? A. I did.

Q. Where was that?

Mr. Graff: May we have the time and place identified?

Mr. Lord: We propose to do that, Your Honor.

The Court. Just proceed.

A. They were in the possession of the accountant L. L. Peterson.

POOR COPY

Q. (By Mr. Lord) And where was his office?

A. He operated from his residence, and I do not recall the residence address.

Q. Did you obtain the books for examination?

A. He brought them to 208 Builders Exchange, our former office.

Q. At about what time?

A. I would say it was possibly in 1949.

Q. You would say it was possibly in 1949. Can you give us a more definite date?

A. The latter part of 1949.

Q. Did you then examine the books? A. I did.

Q. With reference to what particular portions of the books did you make the examination?

A. For the accounts of Harry Shepard and T. W. Banks.

Q. Did you have occasion to—what did you do with the books?

A. I made a computation with respect to the investment account of Harry Shepard to ascertain—

Mr. Graff: Well, just a moment. I submit the question has been answered.

The Court. Yes, you might stop where you are. Counsel may make further inquiry.

Q. (By Mr. Lord) Mr. McKusick, in the course of your investigation, did you determine what investment, Banks had in that venture?

Mr. Graff: Just a moment. That is objected to as calling for a conclusion and not the best evidence.

The Court: Have you any record to show? Can you lay a proper foundation?

Mr. Lord: Yes, Your Honor, I will withdraw that question.

Q. (By Mr. Lord) Did you take any sheets out of the books of that venture?

A. I did.

Q. What did you do with them?

A. I sent them to St. Paul to have photostatic copies made.

Q. How many sheets did you withdraw?

A. I would say offhand three.

Q. What particular account were those sheets concerned with?

A. Two were for the investment account of H. Shepard. One was the investment account of "T.B."

Q. And what years were concerned,—were shown by those three pages?

A. They covered the calendar years—Harry Shepard's account covered the calendar years '41 to '44, inclusive. The investment account of "T.B." covered the calendar year 1945.

Q. Were those sheets of the books then returned to you?

A. They were.

Q. What did you do then with them?

A. Replaced them in the order of their ledger and returned them to accountant L. L. Peterson.

Q. Approximately on what date was that?

A. It might have been—it was early 1950.

Q. You do not remember the exact date?

A. I do not.

Q. While those books were still in your hands, did you receive the photostats?

A. I did.

Q. Did you compare them with the original pages of the books?

A. I did.

(Government's Exhibit 220, consisting of three parts, marked for identification.)

Q. (By Mr. Lord) Mr. McKusick, I show you Government's Exhibit 220. Will you tell me what that is?

POOR COPY

A. It is a photostatic copy of the investment account of H. Shepard in the partnership known as "Coin-A-Matic."

Q. And the first page thereof,—can you identify that?

A. I can.

Q. What year does it cover?

A. The first page covers the calendar years ending—1941, 1942, 1943.

Q. (By Mr. Lord) And the second page, what year endings does that cover?

A. The calendar year ending December 31, '44.

Q. And the third page?

A. The third page shows the investment account of "T. B." in the Coin-A-Matic Amusement Company for the calendar year ending 1945.

Q. Mr. McKusick, do you know where the books and records of the Coin-A-Matic Amusement Company are at this time?

A. I do not.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 220.

Mr. Graff: Now, if the Court please, with respect to Exhibit 220, consisting of three parts, I would like to make the following objections: First, we object again that this is secondary evidence. The necessary foundation for admission of secondary evidence has not been laid. This witness has just admitted on the witness stand that he does not know where the books are. Now, as part of the foundation they have to be accounted for. Secondly, I object to it on the ground that it is irrelevant and immaterial. It appears that the first two parts pertain to a man by the name of Shepard. Now, it does not appear, at least at this time, how material or how relevant that may be. Now, there has been no identification except the initials "T.B." as referring to this defendant. They happen to be his initials, first and last, but

there has been no showing that this represents a page in the book as far as he is concerned.

The Court: The exhibit is received.

Q. (By Mr. Lord) Mr. McKusick, in the course of your investigation, did you have occasion to examine the books and records of McCarthy's St. Louis Park Cafe, Incorporated?

A. I did.

Q. When?

A. Originally I think the first year I was in, 1946.

Q. Did you see the books then? A. I did.

Q. When did you next see them?

A. In the latter part of '49.

Q. Where?

A. They were brought to 208 Builders Exchange Building.

Q. And who brought them there?

A. One of the employees of McCarthy's.

Q. Did you then make an examination of the books?

A. I did.

Q. With reference to what particular accounts did you make an examination?

A. Rita or Thomas W. Banks.

Q. What particular portions of the books did you examine with reference to Rita L. or Thomas Banks?

Mr. Graff: I object to the question insofar as it pertains to Rita Banks on the ground that it is incompetent, and immaterial.

The Court: You may answer. The objection is overruled.

A. The accounts entitled "Rita L. Banks, Advances from officers, or advances from stockholders"—

Q. (By Mr. Lord) Let me ask, was it either or both?

A. Either.

Q. How was the column headed, do you remember?

Mr. Hoffmann: If the Court please, objection is taken to the witness' further testimony on this line of inquiry because of the fact that the Government has by its own exhibits adduced here and had received by the Court, the books that the witness pretends to be testifying from, and we submit the books are the best evidence.

The Court: I am not sure that that is correct. What about it?

Mr. Lord: If the Court please, the books are not self-explanatory and we propose to adduce through Mr. McKusick's testimony that he and Mr. Weinstock together explained certain entries in those books. They worked them out together.

The Court: Have you the books?

Mr. Lord: Yes, Your Honor, the books are here. They are in evidence. However, I think that Mr. McKusick's testimony would be very helpful to explain certain entries in the books which otherwise would not be explainable.

The Court: It would seem very proper to have the books and have the explanations made in connection with the books.

Mr. Lord: Yes, Your Honor. We will do that.

Q. (By Mr. Lord) Mr. McKusick, I will ask you to examine this stack of books here, which we have introduced in evidence, and to take from it the particular books which you examined with reference to McCarthy's Cafe.

A. (Witness complies.)

Q. Now, will you look on the reverse of that book and tell me what exhibit you have, Mr. McKusick?

A. Government's Exhibit 159, which is the general ledger of McCarthy's St. Louis Park Cafe, Incorporated.

Q. And now the particular page to which you propose to refer, Mr. McKusick, will you tell me what exhibit number that is?

A. Government's Exhibit 159-I, entitled "Stockholder's Advances, account No. 40". It shows the following credit:—

Q. To whom? A. I will describe them.

Mr. Graff: Are you reading from the exhibit, Mr. McKusick?

The Witness: Yes. "August 31, 1942."

Mr. Graff: Just a moment. I assume that the exhibit speaks for itself, Your Honor.

The Court: Certainly, but this witness may use it in his testimony. Proceed.

Q. (By Mr. Lord) Mr. McKusick,—

Mr. Landrum: Go ahead.

A. "August 31, 1942, T. Banks, folio 3, $2,000.00. August 31, 1942, T. Banks, folio 3, $5,346.14. February 28, 1943, T. W. Banks, folio 46, $1,000.00. March 31, 1943, T. W. Banks, with the notation February 2, following, folio No. 53, $1500.00. March 31, T. W. Banks—" now, that word is just "Bank" singular. There is no "s" on the end of it,—"T. W. Bank, folio No. 54, $2,000.00." Government's Exhibit 159-F entitled "Notes payable individual," ledger account 52-1. Entry October 31,—

Mr. Graff: Pardon me, a moment, Mr. McKusick. May we have an objection, Your Honor, to the witness reading from the exhibit? And may it be made to all of it without the necessity of repeating it each time?

The Court: There was something about the witness said explaining the books or certain entries in the books. You may proceed.

Mr. Hoffmann: Mr. Reporter, will you give the ledger account number?

The Court: 52-1, I think it was.

A. October 31st—

The Court: What year?

The Witness: There is no year designated, Your Honor.

The Court: Is there anything above that designates the year?

The Witness: Below it there is a date stamped "January 31, 1945", but I was going to read that in the sequence.

The Court: Why, very well, proceed.

The Witness: Read that back, will you?

(The answer was read as follows: "October 31.")

A. "(Banks advance,) R. L. $3,500.00."

A. Government's Exhibit 159-D, entitled "Notes payable", Morris Ring, which is cancelled by a line being drawn through it and an entry, 'Rita L. Banks" written beside it, —obviously two different individuals wrote the notations.

Mr. Hoffmann: Just a moment. I move that be stricken, Your Honor, as characterization of an instrument already received in evidence and thereby invading the province of the jury.

The Court: Oh, yes, that clause may be stricken,—that is, the comment about the handwriting in the book.

A. "Ledger sheet 52-2,"—this entry is October 31, 1946. In pencil, "T.R.S.S." to Rita Banks. In ink, "7-31-47, folio 37-4, $10,000.00." Government's Exhibit 159-C bears the stamp, "McCarthy's Cafe, Incorporated, 5601 Wayzata Boulevard, St. Louis Park, Minn." The ledger sheet is headed "Notes payable-individuals." It bears the ledger sheet number 52-1. "August 1, 1946," there is a notation in pencil, "R. L. Banks, $3,500.00."—"K. Mc. $4,000.00," and "T. J.C. $5,000.00." The $5,000.00 is circled in ink. The sheet begins with a balance of $12,500.00 shown owing to these undescribed individuals. The next entry is November 30, '46, "Tranfer to Bank", B-a-n-k, "Number 52-?,—folio 46,

$15,000.00." There is a date stamp, December 31, '46, which is canceled out in ink.

The next entry is December 31, 1946. In pencil, "12-16-46", Number 7497, and in ink "T. J. C.", folio No. 52 shows a debit of $5,000.00. All the entries I have been reading heretofore were credits.

The next entry, January 31, '47. In pencil, "Brady's Bar." In ink, "Folio 61-2," a credit of $5,000.00. It says, "To balance" in red ink, $12,500.00.

Government's Exhibit 159-A, bears the stamp "McCarthy's Cafe, Inc., 5601 Wayzata Boulevard, St. Louis Park, Minn." The sheet is headed, "Notes payable—individuals." It bears the ledger account number 52-1. It begins with the ink notation, 1947, August 1, balance, "R. L. B. $13,500.00,—and K. Mc C.",—it looks like it might be—that is my interpretation—$4,000.00. "Brady's Bar, Inc., $5,000.00. Total balance, $22,500.00."

August 31, 1947, "R. L. B.", a debit, $10,000.00.

September 30, '47, in ink, "M. Creay," and in pencil a notation—it looks like the numeral 2 with a capital "B" or a capital "T. B.", credit $25,000.00. Then the date October 31, 1947, shows and it was not used. In pencil the year 1948. "March 31," in pencil, "1948, deposit, $15,000.00. To balance, $52,500.00." The corporate records entitled "McCarthy's Cafe, numbered Government's 160, which includes the corporate minutes as well as the stock certificate register shows the following stock certificates issued to Rita Banks:—

Certificate number 6, dated May 31, 1944, calling for 80 shares, issued to Rita Banks. The record is uncancelled.

Certificate No. 10, dated June 1, 1944, calling for two and a half shares, issued to Rita Banks, which is uncancelled.

Mr. Graff: May we have the same objection, Your Honor, as to any testimony concerning Rita Banks without the necessity of taking it all the time?

The Court: That may be understood.

A. Certificate No. 14, dated 5-5-50, calling for 27½ shares, issued to Reta Banks which remains uncancelled.

Q. (By Mr. Lord) Did you discuss these matters with the man in charge of the books?

A. I did.

Q. Did you make a computation? A. I did.

Q. Does that show the investment of Rita Banks in McCarthy's St. Louis Park Cafe?

A. It did.

Q. And for what years?

A. The years,—each year in the period 1942 through 1947.

Q. Did you reduce your computation to writing?

A. I did.

Q. Did you show it to Mr. Weinstock?

Mr. Graff: Objected to as immaterial.

The Court: You may answer that question.

A. I did.

Q. (By Mr. Lord) After showing it to Mr. Weinstock, did you make any changes on it?

Mr. Graff: Just a moment. Objected to as immaterial.

The Court: You may answer that question.

A. I did.

Q. (By Mr. Lord) After you made the changes, did you show it to Mr. Weinstock?

Mr. Graff: That is objected to as immaterial.

The Court: You may answer.

A. I did.

(Government's Exhibit 221 marked for identification.)

Q. (By Mr. Lord) Mr. McKusick, I show you Government's Exhibit 221, marked for identification,—can you tell me what that is?

A. It is an analysis of funds invested in McCarthy's St. Louis Park Cafe.

Q. Does that show the investment account of Reta Banks that you just described?

A. It does,—"Thomas W. or Reta Banks."

Q. Does that contain your analysis of the figures which you have just read to the Court?

A. It does.

Mr. Lord: At this time, Your Honor, insofar as it pertains to the investment account of Rita Banks and Thomas Banks we offer in evidence Government's Exhibit 221, and only insofar as it pertains to these accounts.

Mr. Graff: If the Court please, I am sure the Court appreciates it would take some time to examine this exhibit or, shall I say, proposed exhibit.

The Court: You can do that during the luncheon hour perhaps.

Mr. Graff: Thank you. May I, however, just ask the witness a question or two pertaining to the exhibit now?

The Court: Well, if it pertains to the foundation.

Mr. Graff: It does, Your Honor.

The Court: You may make the inquiry at this time.

Q. (By Mr. Graff) You testified on direct examination that you showed Exhibit 221 to Mr. Weinstock?

A. I did.

Q. On two occasions,—is that correct?

A. That is right.

Q. Can you tell me when the first occasion was, approximately?

A. I think it was in connection with the transfer of the Morris Ring account to Rita Banks.

Q. No, I mean the date when you had completed Exhibit 221 and showed it to Leonard Weinstock the first time — about when was that?

A. I cannot say offhand.

Q. Can you tell me when it was that you showed it to Leonard Weinstock the second time?

A. Oh, the latter part of 1949.

Q. I see.

A. Or the fore part of 1950.

Mr. Graff: I have no further questions at this time, Your Honor.

The Court: Very well, you may proceed, counsel.

Q. (By Mr. Lord.) Now, Mr. McKusick, you have stated that you started this investigation in 1946, is that correct?

A. Right.

Q. Will you sketch for us briefly what you did in the course of your investigation?

A. We —

Mr. Hoffmann: (Interposing.) If the Court please, that is objected to as repetitious. The witness on Monday or Tuesday of last week testified to that as part of his then direct examination.

The Court: Well, he may answer this question. Possibly counsel intends to bring out something new.

A. We examined —

Mr. Hoffmann: Interposing.) If the Court please, I presume the question, in any event, calls for what he did and not what, quoting "We did."

The Court: He may have been working in cooperation with others. You may proceed, Mr. Witness.

A. We who were working on the special investigation were divided up into squads of two each and we examined every cashier's check, bank money order, and certified check in any bank in which it was determined that Mr. Banks had a banking account or that he had a transaction there. If we proved that he bought one bank money order, then we would examine all the bank money orders. If he had one check certified, we examined all the certified checks. We also examined the same data in other banks where Mr. Banks did not have transactions that we knew of. We examined all broker accounts. We examined all public records. We correlated all of the money orders, cashier's checks, certified checks, brokerage records, — in other words, all of the information that we had obtained from any source whatsoever. After classifying the various matter, we arrived at the conclusion —

Mr. Hoffmann: (Interposing.) Now, if the Court please—

The Court: Do you have an objection?

Mr. Hoffmann: I do not presume he should give his conclusion. That certainly is hearsay — "we arrived at the conclusion."

A. I decided —

Mr. Hoffmann: (Interposing.) The same objection whether he decides it or anyone else. I do not know that this witness posesses any more authority than any other individual to state his conclusions in court.

Mr. Landrum: I think he will explain what the situation is, Your Honor. I think I know the purpose of his saying that.

The Court: Well, you might eliminate your conclusion and state what you found after all those examinations.

The Witness: We found that a preponderance of the taxpayer's financial transactions were consummated without reference to a bank account whatsoever. That a —

Mr. Graff: (Interposing) Just a moment, I move that go out on the ground that it is incompetent, a conclusion of this witness and not the best evidence. It is a conclusion on the part of this witness entirely.

The Court: The motion is denied. I think the witness is competent to state the substance of the answer given by him.

Q. (By Mr. Lord.) Mr. McKusick, I believe you were telling what you did, were you not?

A. I discovered that the taxpayer — now, this is in an instance of entering into financial transactions without using a bank institution.

Mr. Graff: Well, now, just a moment. I am going to object to that testimony on the ground, Your Honor, that it is not the best testimony; that it is a conclusion formed by this witness; that there is other competent evidence available, if it is the fact. It is a conclusion on the part of this witness.

The Court: I think the witness is stating what he discovered from the books, is that correct?

The Witness: No, Your Honor, it is a statement of what we discovered in our inquiries at various banking houses and other financial institutions.

Mr. Graff: I make the further objection that it is hearsay.

The Court: I think I will let the record stand as it is. Proceed.

A. (Continuing.) I discovered that the taxpayer would, buy a cashier's check with currency, use the currency or use the cashier's check to buy property, sell the property, use the proceeds of the property to buy War Bonds and cash the War Bonds to buy listed stocks, — in other words that the skein of three or four transactions would be consummated without having deposited money in or withdrawn money from the bank account.

Mr. Graff: If the Court please, I move that the answer of this witness be stricken because it appears that it is a sheer conclusion of this witness; that it is hearsay as far as he is concerned and is not a statement of fact, but is a conclusion on the part of this witness.

The Court: The motion is overruled. The facts ascertained by this witness by an examination of these books and records tend to prove or disprove the question of intent.

Mr. Hoffmann: If the Court please, I think the record should show on behalf of the defendant the further objection that if what the witness on the theory outlined by the Court testified to was permitted, on that basis, that he went beyond that and attempted to characterize what he claims — characterize what he claims to have been the effect.

The Court: Have you any books or records to show what you have just stated in your last answer?

The Witness: Your Honor, there are records entered in the court which related to skeins of such transactions.

Mr. Hoffmann: Now, if the Court please, that is the very word that the defendant takes exception to. I submit that this witness —

The Court: (Interposing.) The word may be stricken.

Mr. Hoffmann: And I ask that the word as used in his previous answer be stricken and in both instances we ask the Court most respectfully to admonish the jury to disregard the use of those words or his characterization of the transactions by the use of those words.

The Court: You have reference to his statement of "schemes"?

Mr. Hoffmann: That is correct.

The Witness: I beg your pardon, it was skein, not scheme —

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Mr. Hoffman: The same objection, Your Honor.

The Court: That is the method or procedure followed by the defendant, I take it, from what you said?

The Witness: That is right, Your Honor.

The Court: I think with that explanation the answer may stand as given.

Mr. Graff: I hesitate to interrupt again, Your Honor, but we are doing our best as we see it here to protect this record and I must most respectfully object to the statement that the Court just made in addressing the question to the witness as I do not think that that statement is borne out by the record at the present time.

The Court: Well, I directed my remark to this witness so that he might set us right on the meaning of the word that he used. I thought I knew what it was and he has stated that I did, or that my interpretation was correct. That is correct, is it?

The Witness: It is "skein." I did not say "scheme."

The Court: I understand that now and I think the jury understands that you did not say "scheme."

The Witness: I never did.

The Court: And you did not use the word "device"?

The Witness: No.

The Court: It was the method that you were describing?

The Witness: That is right, a chain of events.

The Court: I think that is not objectionable. The objection is overruled. You may proceed.

The Witness: I think that is about all I have.

Q. (By Mr. Lord) Did you make inquiry to ascertain whether or not Mr. Banks had during the period 1937 to 1947 inherited any substantial sums of money?

A. I did.

Q. What did your inquiry disclose?

Mr. Graff: Just a moment. I object to that as not being the best evidence.

The Court: Have you any books or records giving answer to that question?

The Witness: No, Your Honor — there was nothing found, so I could make no record, — and no reference to any record.

The Court: Are you still objecting?

Mr. Graff: Well, I do not think that proper foundation has been laid for the witness to answer that question, Your Honor.

The Court: As I understand it, he found nothing. You may proceed.

Q. (By Mr. Lord.) Did you make inquiry to ascertain whether or not during the period 1937 to 1947 Mr. Banks had received any substantial gifts?

A. We made such efforts and found nothing.

Mr. Graff: Well, I move the answer go out for the purpose of making an objection.

The Court: You may make your objection.

Mr. Graff: It is objected to on the ground that there has not been sufficient foundation laid to permit this witness to answer the question.

The Court: The objection is overruled.

Q. (By Mr. Lord) Mr. McKusick, during the course of your investigation did you look for safety deposit boxes in the name of this defendant?

A. I did.

Q. Did you find any? A. I did.

Q. Did you examine the contents of them?

A. I did not.

Mr. Graff: Well, again I presume, Your Honor, that the best evidence of that is not the testimony of this witness. I move the answer go out as not being the best evidence.

The Court: The motion is denied.

Q. (By Mr. Lord.) Mr. McKusick, did you attempt to ascertain how much, if any, cash Mr. Banks had on hand as of July 2, 1937?

A. I did.

Q. Were you successful in finding the answer to that question?

A. I was not.

Q. Did you find any evidence of any substantial cash in his possession on that date?

A. No.

Q. Now, I hand you Government's Exhibit 70. Will you read the first question and the answer to that question?

Mr. Graff: The exhibit, I presume, is in evidence, Your Honor, and it speaks for itself.

The Court: Well, I suppose it is given to the witness to refresh his recollection or to ascertain the data contained in it anyway.

Mr. Lord: That is correct, Your Honor.

Mr. Landrum: What is that exhibit?

The Witness: A list of questions that I submitted to Mr. Joseph A. O'Gordon for answer by his client, T. W. Banks.

Q. (By Mr. Lord.) And are the answers which he gave you contained on that sheet?

Mr. Graff: Well, now, by "he," you mean whom?

Mr. Lord: Mr. O'Gordon for Mr. Banks.

Mr. Graff: Well, now, I will object to it on the ground that there has not been any evidence substantiating that statement.

The Court: Read that question, Mr. Reporter.

(The question was read.)

The Court: The objection is overruled.

A. They are.

Q. (By Mr. Lord.) Read the first question and the answer thereto, if you have an answer.

A. "How much cash did Mr. Banks have on hand July 2, 1937?" No answer.

Q. The second question?

A. "Does the acquisition —."

Q. (Interposing.) No, wait a minute. What is the second part of the first question?

A. B of question 1, that is: "How much cash did Reta Lee Banks have on hand July 2, 1937?" No answer.

Q. Did you make any inquiry of Mr. Banks with reference to cash on hand as of the end of 1947?

A. I did.

Q. In what document did you make that inquiry?

A. Government's Exhibit 70.

Q. Is that the same list of questions and answers to which you just referred?

A. It is.

Q. Now, would you read the question and the answer please?

A. Question No. 20: "How much cash was in possession of Thomas W. and/or Reta L. Banks as of December 31, 1947?" No answer.

Q. Now, Mr. McKusick, I believe you previously stated that you used the net worth method in arriving at your determination of Mr. Banks' income for the years herein question, did you not?

A. I did.

Q. Can you briefly and in simple words explain the pattern of the net worth method which you used in this case? Let us start with the beginning net worth, if you please.

Mr. Graff: Well now, if that question calls for the use of books, documents, or records, I would like to have the witness refer to them.

The Court: He is first going to explain the net worth method of arriving at net income, as I understand it.

Mr. Graff: Well, I think if I heard the question correctly, it was a little broader than that, Your Honor. I think it directed his attention to a beginning period so that is more than just the so-called method.

The Court: Read the question, Mr. Reporter.

(The question was read.)

The Court: You may answer.

A. The net worth system is used where the taxpayer's method —

Mr. Graff: (Interposing.) Just a moment. I object to that answer, Your Honor. As I understand it, the question is as to the method. Now, I think he should answer then, the method. But he is now trying to point out what particular cases he thinks it should be used, which is a different situation.

The Court: No, I do not understand that to be the answer. Proceed.

A. (Continuing.) The net worth system is used where a taxpayer's method of reporting his income is inconsistent with the records which the taxpayer kept, or if the taxpayer kept no records. In this instance I made inquiry —

Mr. Graff: (Interposing.) Well, now, just a moment, Your Honor. That I again submit is not a general description of a so-called net worth method. He is again coming

down to the facts in this case. The question, as I understood it, was on the so-called net worth method.

The Court: Well, you might explain further in a general way how the net worth is obtained.

The Witness: In applying the net worth system or method, we, as investigators, add all of an individual's assets, — his real estate, money owed him by individuals, deposits in bank accounts, and anything of value that he has, — taking each such item at its acquisition or cost, not at its market value. We then ascertain how much that taxpayer owes, — the mortgage on his home, what he owes to other individuals for loans, — in other words, all of his liabilities. We subtract the liabilities from the assets to arrive at what is called "net worth." We do that for each year of the period being examined. The next step is to subtract the taxpayer's net worth at the end of a given year from his net worth— or we subtract the taxpayer's net worth at the beginning of the year from his net worth at the end of the year to arrive at increase in net worth. We compare the increase in net worth with what that taxpayer reported on his income tax return. If that taxpayer has had more money at his disposal in that calendar year than he has reported for income tax purposes in that year, he is in trouble.

Mr. Graff: Well, now, just a moment. I object to that answer and move that it go out and that this witness be directed to refrain from making such statements in the future and that the —

The Court: (Interposing.) Oh, the last phrase of the answer may be stricken. That is, "he is in trouble" may be stricken. It may be disregarded by the jury.

The Witness: If that taxpayer cannot account for the excess of net worth in that year over what he has reported for income tax purposes, either by inheritance, by gifts from someone else, or from any other source, then he is

required to explain the difference. There are further adjustments to this net worth, too. After we get the increase in net worth on any given year, we add to that the Federal income taxes paid, because that part was expended. He could not have that invested in real estate and notes and pay his taxes with it. There is another adjustment,—his living expenses. He first has to live. After that he invests money. Then we make an adjustment for the nontaxable portion of capital transactions. A man pays a tax on actually only 50 per cent of the profit in a capital transaction. In the end we arrive at what a man's actual increase in net worth is in any one year.

Q. (By Mr. Lord) Mr. McKusick, in the practice of the agents in the Bureau of Internal Revenue, do you attempt to find some definite net worth at a given period to start such an analysis?

A. We generally do.

Mr. Graff: Well, I submit that is not responsive, Your Honor.

The Witness: We do.

The Court: That is more responsive.

Mr. Graff: Well, I don't only think it is not responsive; I don't think it is correct.

The Court: The objection is overruled.

Q. (By Mr. Lord) Mr. McKusick, I show you Government's Exhibit 33. Can you tell me what that is?

A. It is an affidavit signed by Thomas W. Banks on July 2, 1937.

Mr. Lord: If Your Honor please, I believe it might be helpful if the Court would give this witness permission to read that affidavit to the jury.

The Court: Is it in evidence?

Mr. Lord: Yes, Your Honor.

The Court: He may read it or you may read it.

Mr. Lord: I will read it.

(Whereupon, Mr. Lord read the document referred to as follows:) (Reading)

"STATE OF MINNESOTA)
) ss AFFIDAVIT
COUNTY OF HENNEPIN)

"I, Thomas William Banks, residing at 3817 Drew Avenue South, in the City of Minneapolis, County and State aforesaid, being duly sworn, depose and states as follows:

"That I am 42 years of age and am married, and that my wife's name is Reta Lee Banks. That my wife is not employed.

"That I am employed by the Old Peoria Liquor Company, 301 North Seventh St., Minneapolis. That my salary is $100 a week. That I have been employed by said company for approximately three years."

I might refer to the end of this exhibit to read to you the date. This is dated the 2nd of July, 1937.

(Reading)

"That I also receive $25.00 per week for advertising purposes from the Seagrams Distilling Company, which I spend in entertaining customers.

"That my wife and myself have a safety deposit box in the First National Bank & Trust Company of Minneapolis standing in the name of myself and my wife, Reta Lee Banks.

"That my wife owns the two story house located at 3817 Drew Avenue South, Minneapolis, where we reside. That the total value of house and lot is approximately $11,000. That same is encumbered with mortgage of between $7,000

and $8,000. That I contribute $110 monthly as payments of interest and principal on such mortgage.

"That I give my wife for living expenses each month approximately $250 which included the $110 payment on house mentioned above.

"That my wife owns a cottage located at 3952 Beard Avenue South valued at about $5,000 and mortgaged for about $3,500. That the rent received for such property pays the interest, taxes and principal payments on mortgage, and that I have not contributed anything of value in connection with the acquisition of this property.

"That I own about 105 shares of Cities Service Common stock, which is listed stock and worth about $4.00 per share. That I also own twenty (20) $1,000 Insull Utility Bonds, which have no value. That I also have other stocks in my possession which are worthless and have no value and that a list of such stocks is appended hereto.

"That my wife owns 25% in the stock of Wheel Service Corporation of Minneapolis. That such stock was in my name at one time but was conveyed to her in about 1930. That such stock has cost about $4,500 in cash.

"That my wife also owns one third interest in the stock of Flour City Body Corporation of Minneapolis, which she acquired in about 1930. That I paid about $1,000 of the cost of such stock and my wife $3,000, a total of $4,000.

"That my wife owns and operated in her own name a 1935 Cadillac Sedan, and that is fully paid for.

"That my wife, Reta Lee Banks, has both checking and savings accounts in the First National Bank of Minneapolis.

"That I own two lots located in Ardmore, Oklahoma, which I have never seen. That I have continued to pay the taxes on same, which amount to between $2.00 and $3.00 per year.

"That I took out a $10,000 life insurance policy in the Penn Mutual Life Insurance Company in 1926. That such policy now has a cash surrender value of approximately $2,500 against which I have borrowed $1,500.

"That I also have Government War Risk Insurance, secured by reason of my service in the army, and on which I pay $196 per year as premiums. That I failed to pay the premiums for several years but understand same can still be reinstated.

"That I own Government Bonus bonds in the amount of $200, which I understand are exempt from attachment for Government indebtedness.

"That I have no bank account in my name and no safety deposit box in my name other than the joint safety deposit box mentioned above. That I have no bank account and no safety deposit box in any other name.

"That I owe $2,000 to Harold Banks, Lexington, Nebraska, which I secured by giving my promissory note about January 1, 1934.

"That it is my opinion that I am actually insolvent at the present time. That the most I have ever been worth was $30,000"—

Mr. Hoffmann: If the Court please, we object to counsel pretending to give import to certain words by inflection of his voice.

The Court: (To Mr. Lord) Oh, just read it, counsel.

Mr. Lord: (Continuing reading) "—about 1920.

"That this affidavit is made for the purpose of disclosing my financial condition, in connection with offer in compromise filed by Peter Valder in July, 1937, to try and settle an assessment of $33,589.92 made in June, 1934."

Q. (By Mr. Lord) Mr. McKusick, again showing you Government's Exhibit 33, did you and Mr. Kleven in the course of your examination have occasion to refer to that exhibit?

A. We did.

Q. Did you assist Mr. Kleven in making any computations based upon that exhibit?

A. I did.

Q. Which of you two made the final computations?

A. Gerald O. Kleven.

Q. Now, Mr. McKusick, will you tell me what part in your net worth analysis was played by that exhibit and the computations which Mr. Kleven made based upon that exhibit?

A. After my determination that all other methods of computing the income tax liability of Thomas W. Banks were unsatisfactory, either to the taxpayer or to the Government, and I settled on an application of the net worth system, I recognized that without a beginning net worth, the application of the net worth system would be practically meaningless. I made inquiries of all the Government files that I knew of and found that this Alcohol Tax Liability had been compromised by Thomas W. Banks and others in 1937. I requested George Anderson of the Miscellaneous Tax Unit that he obtain from the Department of Justice files any information he could concerning the compromise settlement of beverage taxes. At that time Mr. Anderson obtained from the Department of Justice, called me, and delivered the record of the compromise settlement to me.

Q. And was that affidavit a part of that file?

A. It was.

Q. Well now, will you tell me in your analysis and computation what part that affidavit played?

A. By virtue of this affidavit, we established that the taxpayer's net worth as of July 2, 1937 and December 31, 1936 was a certain figure.

Q. Now, you don't purport to have that figure in mind right now?

A. I do not.

Q. You state Mr. Kleven made the actual computation?

A. He did.

Q. Would you say that was the beginning point then for your net worth analysis

Mr. Graff: Just a moment. That is objected to as leading, suggestive, and calling for a conclusion.

The Court: (To the witness) You may answer.

A. This affidavit was—

The Court: Just answer the question. Repeat the question, please.

Mr. Lord: Would you read the question, Mr. Reporter?

(The question was read.)

A. Yes.

Q. (By Mr. Lord) Now, Mr. McKusick, what date, then, did you attempt to establish as the exact beginning point of that analysis?

A. December 31, 1936.

Q. Now, Mr. McKusick, I believe you stated that you made inquiries about inheritance and gifts which might have come to Mr. Banks during that period?

A. I did.

Q. Now, did you make an inquiry to ascertain whether or not there were any outstanding obligations due Mr. Banks in any substantial amounts as of December 31, 1936?

A. I did.

Q. Did you find any such outstanding obligations?

A. I did not.

Q. Now, you stated that during this inquiry you have had occasion to talk to Mr. Banks and his representatives, did you not?

A. Yes, I did.

Q. Did they ever during that time mention to you any outstanding obligations owed to this man as of December 31, 1936?

Mr. Graff: Just a moment. That is objected to as immaterial.

The Court: (To the witness) You may answer.

A. There was no discussion about his liabilities as of December 31, 1936.

Q. (By Mr. Lord) Did they ever mention any to you?

A. No.

The Court: Mention what?

Mr. Lord: Mention outstanding obligations due this defendant as of December 31, 1936.

The Court: (To the witness) I think your answer was that there was no discussion about outstanding assets.

Q. (By Mr. Lord) Now, perhaps I should clarify my question. If some one owed Mr. Banks money at that time, what would you count it as?

A. Receivables.

Q. And how would that figure in a net worth analysis?

A. It would be an asset.

Q. Did you discuss any such assets with Mr. Banks or his representatives?

Mr. Graff: May I inquire as to when?

Mr. Lord: As of December 31, 1937.

Mr. Hoffmann: We submit that is repetitious for the third time. The witness has answered twice there was no such discussion.

Mr. Landrum: He was talking about liabilities. They didn't talk about assets.

The Court: And then they were talking about 1936 and now it is 1937.

Mr. Landrum: 1936, Your Honor.

Mr. Hoffmann: No, the date is the same, Your Honor What they were calling "black" before, they are now calling it "white", and it pertains to the same thing.

The Court: Now, that statement may be stricken. It should be disregarded by the jury. There is nothing "black" or "white". Perhaps I didn't understand just what the inquiry was. You may read the question, Mr. Reporter.

(The question was read.)

The Court: That is what I thought.

Mr. Lord: I would like to change that, if the Court please, to December 31, 1936.

The Court: That correction may be made. Now, Mr. Graff, do you have an objection?

Mr. Graff: Now, if the Court please, I am reasonably sure that what Mr. Hoffmann was stating, the previous line of questioning was to outstanding obligations due Mr. Banks. Then he talked about receivables, how he would characterize any money owed to Mr. Banks, and I think Mr. McKusick said he would characterize it as a receivable. Now, those two, I submit, Your Honor, are the same things. So the ground has already been covered.

The Court: What is different in this question?

Mr. Lord: Well, Your Honor, I think that accountingwise, if the accountants were to interpret it, there would probably be no difference; but I thought I had left some confusion—

Mr. Landrum: If the Court please, may I arise?

The Court: Yes.

Mr. Landrum: The witness is talking about liabilities and counsel is talking about assets. Now he is trying to

clear it up that it is assets. The witness talked about liabilities.

The Court: You had better get together.

Mr. Landrum: That is what the situation was. (To the reporter) Just read that question back and if this witness will listen to it, we will clear it up.

The Court: (To the reporter) Read the question again, Mr. Reporter.

(The question was reread.)

Mr. Landrum: '36, it has been changed to.

Mr. Hoffmann: Now, if the Court please, it is apparent that that is an asset and not a liability.

The Court: That is what the inquiry is about. (To the witness) You may answer, Mr. McKusick.

A. I might have discussed it with Joseph A. O'Gordon.

Q. (By Mr. Lord) Were any such assets called to your attention?

Mr. Graff: Just a moment. I submit that that question again, Your Honor, is broad and has already been answered that there hasn't been any such discussion. I think the witness has said so.

The Court: (To the witness) What was the answer? I am not sure that I know what it is. I want to hear this answer.

A. Read the question back, please.

(The question was read.)

A. The assets shown on the affidavit speak for themselves.

Mr. Graff: Well, I submit that that answer go out as not being responsive to the question.

The Court: That answer may be stricken. The affidavit is in evidence and shows what is in it.

Restate your question to this witness, counsel. Make it complete enough so he will know what you are asking.

Q. (By Mr. Lord) Now, Mr. McKusick, in your discussion with Mr. Weinstock and Mr. O'Gordon, and in your reading of the affidavit filed by the taxpayer, were any matters called to your attention which showed that Mr. Banks was owed money by others as of December 31, 1936?

Mr. Graff: Now, I submit, Your Honor, that first of all the question is objectionable because it is a compound question. It refers to Mr. Weinstock, Mr. O'Gordon, and it refers to the affidavit. The affidavit, Exhibit 32, is in evidence and I assume speaks for itself.

Now, if there is any conversation that is referred to with Mr. Weinstock or Mr. O'Gordon, I think the time and place of the conversation and who else was present should be established.

The Court: (To the witness) You may answer, Mr. McKusick.

A. I can't recall any discussion of the assets in the affidavit. We just simply used them—

Mr. Landrum: We are not talking about the affidavit.

The Court: Now read the question, Mr. Reporter. The witness will give close attention and undertake to answer it.

(The question was read.)

A. No.

Q. (By Mr. Lord) Now, Mr. McKusick, did you ever have occasion to discuss with Mr. O'Gordon while he was representing this defendant and while he had a power of attorney on file with the Treasury Department authorizing him to represent this defendant—did you ever discuss the living expenses of Thomas W. Banks?

A. I did.

Q. When did that discussion take place?

A. I can't remember offhand, but I have a few notations in my diary if I could refer to them.

Q. You may to refresh your recollection, I assume.

The Court: (To the witness) You just use your memorandum to refresh your recollection and give answers to such questions as may be put to you. Proceed.

Q. (By Mr. Lord) Now, Mr. McKusick, have you referred to some writing to refresh your recollection?

A. That is right.

Q. What writing is that?

A. I made a notation on the date mentioned as to a conference with Attorney Joseph A. O'Gordon.

Q. And in what book did you make such a memorandum?

A. My daily diary.

Q. Now, where did that conversation take place?

A. At 208 Builders Exchange Building, our former office.

Q. And what did you say to Mr. O'Gordon with reference to living expenses?

A. I don't remember verbatim what I said or he said.

Q. Did you reach an agreement and an understanding as to what the reasonable expenditures for living expenses made by Mr. Banks were for various years?

A. We did.

Q. And what was that agreement?

Mr. Graff: Just a moment. We will object to that testimony on the ground and for the reason that it is incompetent, irrelevant, and immaterial. The defendant not having been present, the testimony of this witness with respect to that conversation would be hearsay.

The Court: Who was present when this—

The Witness: (Interposing) Attorney Joseph A. O'Gordon, who had filed a power of attorney with us to act in the taxpayer's stead.

The Court: And you were there, of course?

The Witness: I was there, and revenue agent Kleven was there—three of us.

The Court: Mr. O'Gordon had already filed his power of attorney to represent this defendant?

The Witness: That is right, Your Honor.

Mr. Graff: If the Court please, I have Exhibit 34 here, which constitutes the power of attorney, and it occurs to me that the Court may well wish to examine it as to whether Mr. O'Gordon was authorized to bind the taxpayer in a criminal case in a conversation with Mr. Kusick.

The Court: Well, as I remember it, Mr. O'Gordon testified that there was an agreement reached for $10,000.00 a year in his testimony here the other day.

Mr. Graff: I don't think so, Your Honor.

Mr. Landrum: That was Mr. Weinstock.

The Court: There was such testimony?

Mr. Landrum: Yes, Mr. Weinstock did so testify.

The Court: Let me see the exhibit. Very well, then, I am just mistaken about it being Mr. O'Gordon.

(Document handed to the Court.)

The Court: Is there a question pending? If not, you may proceed.

Mr. Landrum: The question was: What was the agreement?

The Court: (To the witness) Well, of course, you should state what was said by Mr. O'Gordon, and what was said by you, in the language used if you can give it. If you can't give it, state in substance what was said.

A. I had a schedule of living expenses which were correlated as a result of my inquiries into Mr. Banks' expenditures for living expenses, and I exhibited them to Mr. O'Gordon and I stated about what we would expect in the nature of living expenses. There was some discussion and I think it was about a day lost—the next day we arrived at living expenses.

The Court: Well, what was said the next day?

The Witness: Mr. O'Gordon stated that he had referred to his client and 'He will be happy to use the figures' that we had agreed on the previous day.

The Court: You mean the data that you had proposed?

The Witness: That is right.

Q. (By Mr. Lord) Well, subsequent to that time did you have a conversation with Mr. O'Gordon with reference to living expenses?

A. I did.

Q. Now, Mr. McKusick, can you tell us what living expenses you submitted to Mr. O'Gordon on the occasion referred to here?

Mr. Graff: That is objected to as immaterial.

The Court: You may answer.

A. May I refer to my diary to refresh my memory?

The Court: You may.

Mr. Graff: If the Court please, with further reference to the proposed question, may I point out that if any part of the witness' testimony is material, which we have not agreed to, it would only be such agreement as may have been arrived at with Mr. O'Gordon. We submit that the details would not be material as being hearsay and not in the presence of this taxpayer.

The Court: Do you care for anything except the final agreement which you say was reached?

Mr. Lord: That is all we want at this time, Your Honor —what Mr. O'Gordon agreed to in the way of living expenses at the time of the conversation just referred to.

The Court: You mean the last conversation referred to?

Mr. Lord: No, Your Honor, at the time of the agreement. I believe I did refer to another time, but at the time that he agreed with Mr. O'Gordon as to living expenses and Mr. O'Gordon came back and said, "My client will be happy to accept them:" I want now to know what the amount of those living expenses were.

The Court: You may refer to your diary and answer if you can.

A. $6,000.00 per year for the first four years.

Q. (By Mr. Lord) And by that you mean what years, Mr. McKusick?

A. '40 through '43.

Q. 1940 through 1943? A. That is right.

Q. And for the year 1944?

A. $9,000.00 per year for 1944 and 1945.

Q. For the year 1946? A. $15,000.00 per year.

Q. And 1947? A. $15,000.00.

Q. Now, Mr. McKusick, when did you next talk to Mr. O'Gordon?

Mr. Graff: Counsel, if you will pardon me. I think you had asked him when this conference was and he had not answered it yet.

The Court: Fix the time as nearly as you can.

The Witness: February 14, 1951.

Q. (By Mr. Lord) Now, is that the time when Mr. O'Gordon returned to you and said Mr. Banks would be happy to accept those figures?

A. That is right.

Q. Did you have another conversation with Mr. O'Gordon?

A. At the time,—yes.

Q. When? A. I imagine three or four days later.

Q. And what was that conversation?

Mr. Graff: Well, now, just a moment. We will object to it on the ground that it is hearsay and not in the presence of this defendant.

The Court: This conversation is with O'Gordon?

Mr. Lord: Yes, Your Honor, while he had a power of attorney representing this taxpayer as his agent in fact.

The Court: You may answer.

A. I said, "Joe, where is the letter?"

Q. (By Mr. Lord) And what letter do you refer to?

A. A letter from the taxpayer confirming the amounts of the living expenses which we had agreed on.

Q. Had Mr. O'Gordon indicated that he would furnish you such a letter?

A. He did.

Q. And what was his reply to that question?

Mr. Graff: Pardon me, Mr. McKusick. May our same objection run to the entire line of testimony, Your Honor?

The Court: It is understood.

Mr. Graff: Thank you.

A. He stated that he was in the middle between the taxpayer and the taxpayer's accountant, and he directed me to go to Mr. Weinstock and settle the issue of living expenses with him, and that he, O'Gordon, was giving us permission to go to Weinstock, although O'Gordon held the power of attorney.

Q. (By Mr. Lord) And what did you do?

A. I went to Mr. Weinstock.

Q. What took place then?

A. I displayed our calculation of the taxpayer's living expenses to Mr. Weinstock.

Mr. Graff: Now, just a moment. I take it Mr. O'Gordon was not present?

The Witness: No.

Mr. Graff: Neither was Mr. taxpayer?

The Witness: No.

Mr. Graff: Then, we will object to it on the ground that it is hearsay, Your Honor, not in the presence of the defendant.

The Court: What is your answer to that?

Mr. Lord: I propose to establish the date, Your Honor, and then I will be in a better position to—

The Court: (Interposing) Well, proceed.

Q. (By Mr. Lord) And what was the date of this conversation, Mr. McKusick?

A. May I look at my diary?

(Witness checks diary.)

On April 24, 1951.

Q. Mr. McKusick, I show you Government's Exhibit 35. Do you recognize that?

A. I do.

Q. Had you seen that previous to the time you talked to Mr. Weinstock about living expenses?

A. I had.

Mr. Lord: If the Court please, Government's Exhibit 35 is a power of attorney running to Mr. Weinstock, signed by Mr. Banks and dated the 5th of April, 1951. The witness has stated that the conversation took place on the 21st of April, or about fifteen or sixteen days after the power of

attorney was filed. We submit that the admissions, the statements of his attorney in fact, are admissible against this defendant.

Mr. Graff: If the Court please, we object to this question on the ground that this power of attorney did not authorize either Mr. Weinstock or Mr. McKusick to enter into any agreement with respect to living expenses which would be binding upon this taxpayer. We suggest that probably the Court examine the power of attorney to see whether there is anything said in there about any agreements with respect to living expenses.

The Court: Let me see the exhibit, Mr. Clerk.

(Exhibit handed to the Court.)

Mr. Graff: May I add the further ground that regardless of the terms in the power of attorney, there was no authority on the part of Weinstock to make any commitment which would be binding upon the defendant in a criminal case. Certainly he cannot make an extra judicial statement or confession on behalf of the defendant.

The Court: Oh, I think the power of attorney is sufficient.

Q. (By Mr. Lord) What was your conversation with Mr. Weinstock about this agreement?

Mr. Graff: Just a minute. Let the Court enter its ruling.

The Court: I said I thought the power of attorney was sufficient to permit an answer. You may answer.

A. We discussed the schedule which Mr. Kleven and I had itemized in detail,—the light bill—all of the things with relation to living expenses, and displayed them to Mr. Weinstock, and he said it was his theory that a man lived according to his income. We stated we had no argument with that proposition and asked him to be practical about it, and "What would you suggest?" So it was his suggestion, —we discussed each year in detail,—and it was his sug-

gestion that we use the living expenses which we have now applied.

Q. (By Mr. Lord) And what are those living expenses, Mr. McKusick?

Mr. Graff: May our objection run to the entire line of testimony, Your Honor?

The Court: Yes.

A. I do not have any notation of the living expenses.

Mr. Lord: May I hand this man a paper that might serve to refresh his recollection?

The Court: Yes.

(Document handed to the witness by Mr. Lord.)

Q. (By Mr. Lord) Is the paper which you are examining the schedule which you prepared?

A. It is.

The Court: What sort of a schedule? When was it prepared?

Q. (By Mr. Lord) When was that schedule prepared?

A. This schedule was prepared—I would say February and March, 1951.

Q. What does it—what is it a schedule of?

A. It is a summary of all of the elements that go into living expenses.

Q. Well, now, using that to refresh your recollection, do you recall the figures which you agreed upon with Mr. Weinstock as to this defendant's living expenses for the various years?

A. It was $6,000.00 a year for 1937 to 1941, I believe.

Q. To '41? A. Including '41, inclusive.

Q. All right. And for the year 1942?

A. I think there was a bracket there, like '42 through '45, was $10,000.00 a year, and '46 and '47 were $12,000.00 a year.

Q. Mr. McKusick, state whether or not you have already stated here that you examined for assets and liabilities for all years '37 to '47 inclusive?

Mr. Graff: I think that was the subject of examination this morning, Your Honor.

The Court: You may answer.

A. We were—we looked for both assets and liabilities for each year of the entire period.

Q. Was that from '37 to '47, inclusive?

A. '37 to 47, inclusive.

Q. Mr. McKusick, in the course of your investigation, did you have occasion to examine the books and records of the Blue Goose Resort, Incorporated?

A. I did.

Q. Are those books and records in evidence in this case?

A. They are.

Q. Did you have occasion in conjunction with Mr. Weinstock to make an analysis of certain accounts in those books and records?

Mr. Graff: Just a moment. Objected to as immaterial.

The Court: You may answer.

A. I made the analysis. I only referred to Mr. Weinstock items which the books were not quite clear on.

Q. (By Mr. Lord) Mr. McKusick, did Mr. Weinstock help to clear you up on those items?

Mr. Graff: Just a moment. Objected to as leading, suggestive, calling for a conclusion, and not the best evidence.

The Court: You may answer.

A. He did.

Q. (By Mr. Lord) Mr. McKusick, in order to help clarify the books and records of the Blue Goose Resort, Incorporated, and particularly the records to which you referred, I am going to ask you to step down to the Clerk's table here

and take back to the witness chair with you those books and records which you examined.

A. (Witness complies.)

Q. Now, would you tell us what you examined and tell us what they show?

A. I examined all accounts in the name of Rita L. and/or Thomas W. Banks, as well as any advances from stockholders or advances from others in the general ledger of the corporation.

Q. And are those records contained in Government's Exhibits 152 and 153?

A. They are.

Q. Did you make an analysis of those accounts?

A. I did.

Q. Mr. McKusick, did Mr. Weinstock aid you in the determination of what some of those accounts meant?

Mr. Graff: Just a moment. Objected to as leading, suggestive, calling for a conclusion, not the best evidence, and hearsay.

The Court: You may answer.

A. Those—there was no determination. He explained one or two items.

Q. (By Mr. Lord) Mr. McKusick, were you able, from those books and records, from your investigation, to determine what the investment of Rita Banks and Thomas Banks was in the Blue Goose Resort, Incorporated?

Mr. Graff: Just a moment. May we have an objection, Your Honor, to this question and any others that may follow, objecting to any testimony pertaining to Rita Banks or any others except Tom Banks, on the ground it is irrelevant and immaterial.

The Court: Have the defendant and Rita Banks been making joint tax returns? Did they during the period involved in this case?

Mr. Graff: I think not, Your Honor. I think they are separate returns.

Mr. Lord: If the Court please, I believe in Government's Exhibit 33 the defendant,—that is the question and answers —the defendant has stated that the increase in net worth that is unexplained on the part of Rita Banks is due to moneys received from this defendant and I believe that the record will further show in deeds and income tax returns that numerous properties held by Rita Banks were taken by this defendant when sold for purposes of capital gains, —they were treated as his own, on numerous occasions borne out by the records in evidence in this case.

The Court: Very well.

Mr. Graff: If the Court please, the answer which I think is the answer, which is Exhibit 71, I think—they are also in Exhibit 70—

The Court: Of course, there has been an intermingling of funds and profit of the two parties mentioned.

Read that question, Mr. Reporter.

(The question was read.)

The Witness: I was—

The Court: (Interposing) Just a moment. If you have any further objection, you may make it.

Mr. Graff: I simply want to point out to the Court, Your Honor, that counsel's statement of what is contained in Exhibit 71 does not agree with my understanding of it and I believe his further statement is further not borne out in the conclusion that he reaches from certain real estate transactions. I do not think that his statement is borne out by the record.

The Court: You may answer the question, Mr. McKusick.

Mr. Lord: Will you read the question, Mr. Reporter.

The Court: Well, it simply inquires as to how much each of these parties, the defendant and his wife, had invested in the Blue Goose business.

Q. (By Mr. Lord) Now, I direct your attention particularly to December 31, 1941,—what amount was invested by Thomas and Rita Banks in the Blue Goose Resort, Inc., as shown by your examination, and analysis of the books of that company?

Mr. Graff: Well, now, just a moment. That question has now been changed and the question now—

The Court: Very well, the last question may be stricken. The preceding question may be re-read, Mr. Reporter. (To the witness) Mr. McKusick, you will notice the question and make answer.

(The question was read.)

Q. (By Mr. Lord) And what was that investment?

Mr. Graff: Now, just a moment.

The Court: I think you have your objections in the record.

Mr. Graff: Well, I think, Your Honor, I would like to make one further objection, if I may.

The Court: All right.

Mr. Graff: I think that the exhibits in evidence are the best evidence of it and I would like to have the witness use the exhibits in evidence so that we may identify them as to where he gets his information.

The Court: When you cross-examine this witness, you may have him do so. You may answer the question.

A. My examination disclosed that T. W. Banks had no nominal interest in this corporation, but that Rita L. Banks

was both stockholder and financial banker in that she advanced funds,—loaned funds to the corporation.

Q. (By Mr. Lord) Mr. McKusick, what was the amount of the investment of Rita Banks as of December 31, 1941?

A. She had no investment.

Q. Are you including in your question—in your answer her stock investment,—your answer to that question?

A. I am reading the "advance" account. Are you talking about stock?

Q. Let me revise my question. Now, did you in your computation include the evidence of ownership of stock by Rita Banks contained in Government's Exhibit 150?

A. No.

Q. I am going to ask you the question, based on the ownership of stock and the advances in the way of investments in this company, did you arrive at a conclusion as to the amount invested in the Blue Goose Resort Corporation by Rita Banks and Thomas Banks?

A. I did.

Mr. Graff: Just a moment. I submit, Your Honor, that that question has already been asked and answered, and I object to it on the ground of repetition.

Mr. Landrum: He said he did, Your Honor.

The Court: Yes.—I am not sure that I understand the answer if one has been made. You may answer.

The Witness: I answered it, Your Honor.

Mr. Landrum: What did you say?

The Witness: I did.

Mr. Landrum: Tell the Court what you said, Mr. McKusick.

The Witness: I did.

The Court: Very well.

Q. (By Mr. Lord) Did you arrive at a conclusion as to the investment of December 31, 1941?

A. It was no conclusion—

Mr. Hoffmann: (Interposing) Now, if the Court please, we object to the form of question because it asks for a conclusion and not the facts. The exhibits speak for themselves and his interpretation of them or his conclusion derived from an inspection of the exhibits, we submit invades the province of the jury.

The Court: You may answer.

A. It was no conclusion. Government's Exhibit 150, which is the corporate records, the minutes as well as the stock certificate register, shows that Rita Banks was issued certificate No. 5, calling for 47½ shares in the name of R. L. Banks,—no date—and certificate No. 9, calling for 23¾ shares, issued to R. L. Banks—no date. This shows that the 47½ shares and the 23¾ shares at $100.00 a share indicate that Rita Banks' investment in the stock of the corporation was $7,125.00.

Q. (By Mr. Lord) As of what date?

A. The corporation was organized just prior to, or on or about May 14, 1941. In view of the fact that the stock certificate register is undated, the date of 5/14/41, will have to be used.

The Court: What is that date again?

The Witness: May 14, 1941.

Mr. Graff: I object to that last portion of his statement and ask that it go out as not being responsive and being solely a conclusion of this witness—that portion that May 14th would have to be used.

The Court: The motion is overruled.

Q. (By Mr. Lord) State whether or not those records show that she retained those stocks through 1947.

A. Those certificates show that they are still outstanding, but there was an original certificate No. 1, which I did not read, dated May 14, 1941, calling for 118 shares to "R. L. Banks" which has been voided.

Q. Then the $7,125.00, which you say was invested, is that shown as being still outstanding?

Mr. Graff: Just a moment. I object to that statement as not being a proper statement of this witness' testimony.

The Court: Well, we will find out whether it is proper or not. You may answer.

A. It does.

Q. (By Mr. Lord) Mr. McKusick, I believe I succeeded in confusing you. Will you tell me what you arrived at when you examined the other portion of the books and records of the Blue Goose Resort, Incorporated?

A. It showed no interest in the name of Thomas W. Banks, but it did indicate that Rita L. Banks participated in the account designated "Advances from stockholders and others."

Q. What does that mean, she participated in the account?

A. That means that she and other stockholders, or other individuals, advanced money to the corporation.

Q. And is that aside from the stock record which you just read?

A. It is.

Q. Now, what does that account show with reference to the amount of money advanced by Rita Banks?

Mr. Graff: I wonder if you could identify the book that you are referring to when you are giving us that information,—what exhibit, I mean.

The Court: That is proper.

Q. (By Mr. Lord) Mr. McKusick, I believe we have marked certain pages with those papers. It might help you in finding the exhibits you want to find.

A. Government's Exhibit No. 152-F—

Q. (Interposing) Now, you are going to state all of the various exhibits which you used in this computation, are you not?

A. I am. Mr. Reporter, change that to 152-G—

Mr. Hoffmann: Did he change the exhibit number, Mr Reporter?

The Court: What is the exhibit number?

The Witness: 152-G, Your Honor.

Q. (By Mr. Lord) I believe that it will suffice if you name the exhibit number without reading the entire exhibit, Mr. McKusick. Name the various exhibit numbers which you studied in arriving at your conclusions.

A. 152-G is the first one, 152-F—

The Court: What is it, -F or -G?

The Witness: -F is the second one, Your Honor. I am reading several. My last one was 152-F.

Q. (By Mr. Lord) I suggest that you do not take the papers out. You will have occasion to refer to those exhibits again.

A. 152-E, 152-C, 152-B, and 152-A.

Q. Did you state that you had arrived at a figure which presented the amount advanced to or from Rita Banks to that corporation?

A. I did.

Q. For the year ending 1942, December 31st?

A. I did.

Q. And what was that figure?

A. She owed the corporation $2,420.00.

Q. And did you arrive at a figure respresenting the amount advanced to or from that corporation by Rita Banks for the year ending December 31, 1943?

A. I did.

Q. And what was that amount?

A. The corporation owed Mrs. Banks $10,469.45.

Q. Did you arrive at a figure representing the amount owed to or from that corporation by Rita Banks for the year ending December 31, 1944?

A. I did.

Q. And what was that figure?

A. The corporation owed Rita Banks $16,514.82.

Q. And did you arrive at a figure showing how much was owed to or from that corporation by Rita Banks at the period ending December 31, 1945?

A. I did.

Q. And what was that figure?

A. The corporation owed Rita Banks $9,477.02.

Q. Did you arrive at a figure showing Rita L. Banks' balance in that account as of December 31, 1946?

A. I did.

Q. And what was that figure?

A. $1,488.13.

Q. Was that an asset owed to the company or owed from

A. (Interposing) Rita Banks owed the corporation.

Q. Did you arrive at a figure showing Mrs. Rita Banks' balance in that account as of December 31, 1947?

A. The corporation owed Rita Banks $511.87, on December 31, '47.

Mr. Lord: If the Court please, with reference to Government's Exhibit 221, we offered that in evidence before lunch, and counsel stated that he would like to examine it during the lunch hour and at this time we would like a ruling on that exhibit because the witness proposes to explain from it further.

Mr. Graff: I have, your Honor, examined the exhibit and I have a good deal of cross-examination that I would like to conduct of the witness before I state my objections to it.

The Court: Let me see the exhibit.

Mr. Graff: I am perfectly willing to defer that cross-examination, Your Honor, until the witness is turned over, if that should be more desirable.

The Court: It appears that counsel desires to use it in the examination of the witness. If you have anything pertaining to foundation, I suggest that you inquire at this time. This is not the time for cross-examination.

Mr. Graff: I appreciate that, Your Honor. It goes to the very foundation for the exhibit.

The Court: Very well, you may inquire as to foundation.

Q. (By Mr. Graff.) Mr. McKusick, I hand you Government's Exhibit which has been identified as 211, and I direct your attention to an item here, 10-31-47, $21,000.00. Would you be good enough to show me in what books or records you got that figure from?

A. (Witness leaves stand to secure exhibit from Clerk.)

Mr. Lord: Would it be agreeable to the Court to allow this witness to stand at the table here? He is having an awful time having those books in his lap.

The Court: He may stand wherever it is convenient for him to handle those books and testify.

A. The item of $25,000.00 was obtained from Government's Exhibit 159-A.

Q. (By Mr. Graff.) And will you please point out on Government's Exhibit 159-A where the particular entry is on that 159-A?

A. (Witness indicates.)

Mr. Landrum: Testify orally, Mr. McKusick. You are pointing to it with your finger. Put it in the record.

The Court: What page in the book?

The Witness: It is on Government's Exhibit 159-A, the corporation is page No. 52-1.

The Court: What is that book?

The Witness: It is the general ledger of McCarthy's Cafe, Incorporated. The entry is on September 30, 1947. The led-

ger shows "M. Carey," and there is a pencilled notation beside it that can be either "TD" or the numeral "2. D.", either one.

Q. (By Mr. Graff.) And may I direct your attention to the fact that the entry of $25,000.00 is made in ink on page 159-A, is it not?

A. It is.

Q. And is it not exactly opposite the entry "M. Carey," written in ink?

A. That is right.

Q. And appears to have been written at the same time?

A. That is right.

Q. So that if you were reading this ledger, it shows that M. Carey deposited or paid in $25,000.00 to McCarthy's on the date indicated, which I think is September 30, 1947, and not October 31, 1947, as demonstrated by Exhibit 221? Is not that correct?

A. It would appear that way.

Q. So that Government's Exhibit 159-A shows that one M. Carey had the credit of $25,000.00, and not Thomas Banks as you have put in on Exhibit 221?

Mr. Landrum: If your Honor please, I am just wondering if this is not the regular cross-examination.

The Court: Yes, it is cross-examination.

Mr. Landrum: Rather than as to foundation.

The Court: Is there something else in connection with this exhibit?

Mr. Graff: Yes; I have not heard the answer yet.

The Court: You may answer.

The Witness: What is the question?

The Court: Read it, Mr. Reporter.

(The question was read.)

A. The records do show that credit is due one "M. Carey."

Q. (By Mr. Graff.) And will you please point out to us what records—excuse me, you said to M. Carey?

A. That is right.

Mr. Landrum: Go ahead and finish it Mr. McKusick. You wanted to finish the question, did you not,—or finish the answer.

A. (Continuing.) Investigation disclosed that this—

Mr. Graff: (Interposing.) Well, now, just a moment.

The Court: You may answer.

A. (Continuing.) —That this $25,000.00 represents the proceeds of Mr. Banks' investment in National Plastics, with which Archie M. Carey was associated. Mr. Banks has admitted that he had a half interest in this $25,000.00. Since we made this schedule, we have reduced the $25,000.00 as a credit to another individual whom I have also investigated and who admitted the ownership of the other half.

Mr. Graff: Well, now, just a moment, if the Court please. I move that the last portion of that answer go out as not responsive, as stating conclusions which are not based upon facts, and which are not based upon records in evidence.

The Court: Well, your motion is denied. You probably got something you did not want, but if it can be sustained by the records in this investigation, it is not going to be stricken.

Mr. Graff: Well, if the Court please, I would like to have the witness produce at this time all the records that are necessary to substantiate the voluntary statement that he made.

The Court: If they are available and it is convenient, you may do so. Otherwise, you may assemble those records at another time and present them.

Mr. Landrum: If Your Honor please, the thing that is disturbing me is that Counsel is going into a regular cross-

examination in place of trying to lay a foundation for an objection.

Mr. Graff: If the court please, I am cross-examining him on this exhibit and only that.

The Court: I know you are, and that is the very thing I asked you not to do.

Mr. Graff: Your Honor, how can I—

The Court: (Interposing.) You had a right to ask this witness where he got his information, and he has shown to you the books, or the book that he got it from, and there you should have stopped without entering into a cross-examination.

Mr. Graff: If the Court please, that exhibit does not show that credit to Thomas Banks.

The Court: You disagree with him as to that and he has added some other records.

Mr. Graff: If Your Honor please, the exhibit is in evidence and I submit that it does not so show.

The Court: Is there anything further pertaining to foundation that you want to ask this witness?

Mr. Graff: I do, Your Honor.

The Court: Proceed. Ask him.

Mr. Landrum: As I understand it, counsel has asked the witness to produce the record from which he got that information and he has got it in his hand.

The Court: All right. This is a good time to find out what it shows.

The Witness: This $25,000.00 is the only record of new money in that year. The settlement I made with that other

taxpayer,—he admits that he advanced $12,500.00 to this corporation, and signed a statement to that effect.

The Court: Where did you get that?

The Witness: In the investigation of the other taxpayer, Harry Shepard.

Mr. Graff: Well, now, if the Court please, I submit that anything that—who is this other taxpayer?

The Witness: Harry Shepard is his name.

Mr. Graff: Anything that Harry Shepard may have said is certainly not binding upon this defendant and the statement that he has deduced is hearsay.

The Court: Well, this record contains much data associating this defendant with Harry Shepard. That is my understanding.

Mr. Graff: Your Honor, that may be true, but this defendant is not bound by anything that Harry Shepard has said or anyone else.

The Court: Well, that depends on whether they were partners in some business or not.

Mr. Graff: Well, I readily submit that in certain partnership matters, a person may be somewhat foreclosed by what a partner may have said, but this appears, if I understand Mr. McKusick correctly, is a tax settlement that you made with Mr. Harry Shepard?

The Witness: Harry Shepard was investigated in 1951.

Mr. Graff: Certainly that does not bind Mr. Banks. May I, Your Honor, in order—defer any further cross-examination with respect to this witness as part of the regular cross-examination?

The Court: Now, you wanted to examine this witness as to foundation for this Exhibit 221. I have given you the op-

portunity. Now, if you have anything further to ask pertaining to foundation, you may do so.

Mr. Graff: Thank you, Your Honor. I will so proceed.

Q. (By Mr. Graff.) Mr. McKusick, directing your attention to Government's Exhibit 221,—

The Court: (Interposing.) You may have this chair, Mr. McKusick, unless you desire to examine the—

The Witness: It is a large exhibit, Your Honor. I would sooner stay right down here.

Mr. Graff: It is a little easier for me to point it out if I stand here with him, Your Honor.

The Court: That is satisfactory.

Q. (By Mr. Graff.) Now, directing your attention to certain statements under the heading "Coin-A-Matic", there are listed certain figures. Would you please show me the books from which you got these figures to put on Exhibit 221? Let me direct your attention to the first item of $4,213.15 in the column headed "Coin-A-Matic" under the debit column and for the date 4-30-43?

A. I direct your attention to stockholder's advances, Government's Exhibit 151-I, showing debit April 30th, paid by cash $4,213.15.

Q. Does Government's Exhibit 159-I contain on its face the word "Coin-A-Matic"?

A. No, it does not.

Q. Now, I think if you will take the stand, I will go back here.

(Witness returns to the stand.)

Q. Now, Mr. McKusick, is not it a fact that there are certain figures contained on Government's Exhibit 221 which do not appear on the records which have been introduced into evidence here?

A. No.

Q. May I direct your attention to the question just asked of you with respect to the entry on 4-3-43, to the debit of Coin-A-Matic, $4,213.15. It does not appear on Government's Exhibit 159-I anywhere that Coin-A-Matic advanced that money, does it?

A. Actually—

Q. No, I think you can answer that yes or no. Either it does appear or it does not.

A. No.

Mr. Graff: Now, at this time, if the Court please, we object to the introduction into evidence of Government's Exhibit 221, it appearing by the testimony of this witness that it contains other information not contained in the records which are here in evidence and as to that portion of it, we submit that it is hearsay and there is no privilege of cross-examination with respect to it.

The Court: What is your explanation for this last answer that you gave, if any?

The Witness: Well, Your Honor, do you want the whole story?

The Court: I want the explanation.

The Witness: The Coin-A-Matic Amusement Company was examined concurrently in this period of investigation. It was discovered that a check in the amount of $10,000.00 was charged to the "Suspense" account of Coin-A-Matic Amusement Company, and this $10,000.00 was used to buy a bank money order at the Marquette National Bank. At the same time there was a check drawn on McCarthy's St. Louis Park Cafe for about two or three thousand dollars odd, —I do not recall the figure,—the total amount of thirteen thousand odd was used to buy an off-sale liquor store located at Ely, Minnesota. The liquor was transported to Minneapolis. A part of it was sold by an individual by the name of Henry Sabes. The balance of it was stored in the warehouse

stock of McCarthy's St. Louis Park Cafe, Incorporated. A credit was set up for the current value of this liquor and it was retired by checks payable to these individuals, or anyway, it was extinguished within the year. No part of it was covered in the year-end balance.

Q. (By Mr. Lord.) Now, Mr. McKusick, can you connect that a little bit more directly with the way in which you entered that item?

A. In my analysis of the advances from stockholders and payments to stockholders and other individuals, I had to go across this sheet that showed the record of this liquor transaction, because I took every item in the entire ledger that affected stockholders and others advances, so I had to come across this item of liquor.

Q. Now, what record are you referring to?

A. The general ledger.

Q. Well, is that in McCarthy's, or in the Blue Goose record here?

A. McCarthy's St. Louis Park Cafe.

Q. McCarthy's St. Louis Park Cafe?

A. It is.

Q. How did you then decide to charge the $4,213.15 on Government's Exhibit 159-I under the heading "Coin-A-Matic" on Government's Exhibit for identification 221?

A. Because I was examining all of the records of all of the ventures that this taxpayer was interested in and I kept a mental, if not physical, cross-index, so when I discovered on McCarthy's, or on the Coin-A-Matic records that they had advanced money to McCarthy's Cafe from the endorsements on the backs of checks, then I made a note in the McCarthy's file to look for that money coming into the corporation.

Q. And did you find it?

A. I did.

Q. Where was it? A. "Advances."

Q. Is that the entry that is contained on Government's Exhibit 159-I?

A. This is the repayment of the liquor.

Q. Did you talk to Mr. Weinstock about those entries?

Mr. Hoffmann: Just a moment. If the Court please, I do not understand if that statement of the witness pretended to be an answer to the question of the District Attorney. If it did, I see no responsiveness in it.

Mr. Lord: Would you read the question, Mr. Reporter?

(The second last question and answer were read.)

The Court: What are you referring to when you make that answer?

The Witness: The entries on the left hand side of the ledger, Your Honor.

The Court: Of what ledger?

The Witness: Of the general ledger of McCarthy's Cafe. This bears on 221, this analysis that I made.

The Court: On what page of the ledger do you find that?

The Witness: Government's Exhibit 159-I, the corporation's Ledger Sheet No. 40, under "Stockholder's Advances".

Mr. Graff: May I ask him a question at this point, Your Honor?

The Court: Yes, one question.

Mr. Graff: Thank you.

Q. (By Mr. Graff.) Is not it a fact, Mr. McKusick, that in order for you to make up Government's Exhibit 221, you had to use other documents and other books than the books and documents that have been here introduced before court?

The Witness: In order to get the true record of what should have been entered on the ledger.

Mr. Graff: Well, I think, Your Honor, that rather begs the question. I think that he should admit whether he had to use other books or not.

The Witness: Yes, I did.

Mr. Graff: All right. Well, then, I submit that no proper foundation has been laid for Exhibit 221 because books and records relied upon by this witness are not in evidence.

The Court: Where are those books and records?

Th Witness: We tried to get Harry Shepard to produce them in court and he cannot be found.

The Court: Has he the books and records that you used?

The Witness: He was the partner from whom I obtained the books and records indirectly.

The Court: Do you know where the books and records are?

The Witness: I do not.

The Court: What did you do with them?

The Witness: I returned them to L. L. Peterson, the accountant for Coin-A-Matic Amusement Company.

The Court: You have not seen them since you returned them to him?

The Witness: I have not.

The Court: You do not know where they are ?

The Witness: I do not.

The Court: Is there anything further?

Mr. Lord: No, Your Honor.

The Court: Do you mean you are through with your direct examination of this witness?

Mr. Lord: Well, with reference to foundation only, Your Honor—I had proposed to have the Court rule on that exhibit, if you please, and then I propose to examine him further with

reference to the results, to make it more clear for the record and for the Court and jury.

The Court: That is Exhibit 221?

Mr. Lord: Yes, Your Honor.

The Court: It is received.

Q. (By Mr. Lord.) Now, Mr. McKusick, as a result of your analysis of the books and records of McCarthy's Cafe, were you able to arrive at a figure showing the investment in that company by Thomas or Rita Banks, or both?

A. There was no record of an investment by Thomas Banks in the corporation.

Q. What did it show with reference to an investment?

A. It showed advances made in the name of Rita Banks as well as ownership of stock in the corporation.

Q. Well, now, directing your attention particularly to "Advances", can you tell me what the records showed as be-in the advances of Rita Banks to that corporation?

Mr. Graff: Pardon me a moment, Mr. McKusick. I wonder, Your Honor, if the witness can refer us to the record that he has in mind when he testifies in answer to this question?

The Court: Give the reference, any reference you may have furnishing the facts called for in this question.

A. Exhibit No. 159.

Q. (By Mr. Lord.) Will you name the sub-exhibits which you refer to in making this determination?

A. Exhibit 159-I,—

Q. (Interposing.) Maybe if you started from the front of the book we could keep it in better order, Mr. McKusick.

A. 159-A, -B, -C, -D, -E, -F, -G, -H, and -I, as well as 160.

Mr. Landrum: All right, go ahead, Mr. McKusick, with your answer to the question.

Q. (By Mr. Lord.) Mr. McKusick, will you answer the question which I have propounded—

Mr. Lord: Would you read the question, Mr. Reporter?

(The question was read.)

Mr. Lord: May I amend that question, Your Honor?

The Court: Yes.

Q. (By Mr. Lord.) Will you tell me what figure you arrived at as being the advances by Rita Banks to that corporation?

Mr. Graff: Well, now, I assume from the change in the question that the answer is going to be based not upon the records which are in evidence and for that reason I object to the question as now constituted. If it is from the records that are in evidence, I have no objection.

The Court: The objection is overruled. You may answer.

A. My analysis showed that the balance owing to Rita Banks December 31, 1942, was $7,364.14.

Q. (By Mr. Lord.) Did you state that that was her investment?

A. In 1943 her "Advance" account in the amount of $11,864.14 was cleared out to the investment account. It showed that the balance on December 31, 1944, was $3,500.00. It showed that the balance December 31, 1946, was $13,500.00.

The Court: You say that was '46?

The Witness: That was '46, Your Honor.

Mr. Hoffmann: So that there may be no confusion in the record, Your Honor, I take it the record may show that when the witness uses the word "it" he is referring to his analysis prepared from the material that he has heretofore described.

The Witness: My analysis showed that on December 31, 1947, Rita Banks' credit for advance account was $38,500.00, but that balance was subsequently corrected and reduced in

the amount of $12,500.00 to show the credit to Rita Banks in the amount of $26,000.00.

Government's Exhibit 160, certificate No. 6, dated May 31, 1944, calls for 80 shares, issued to Rita Banks, showing in the register as "Uncancelled." Certificate No. 10, dated June 1, 1944, calling for 2½ shares in the name of Rita Banks, remains uncancelled. Certificate No. 14, dated May 5, 1950, calls for 27½ shares issued to Rita Banks. Now, in regards to this 1950 issuance—

Mr. Hoffmann: (Interposing.) Your Honor, may the record show when the witness so testifies what he is testifying to or explaining. I now do not understand I am sure the record is not clear whether the witness now pretends to interpret his own analysis for the book itself, marked Exhibit 160.

The Witness: Your Honor, the record is not clear and I can explain it.

Mr. Hoffmann: I want to know what, Your Honor, he is explaining so that the record may demonstrate it.

The Court: All right. You may state wherein the record is not clear and give your explanation of it. Have you finished your statement of the outstanding stock of this company?

The Witness: That is right, Your Honor.

Q. (By Mr. Lord) Mr. McKusick, will you tell me for the various years whether or not you have made an analysis of the amount of money invested in that stock, as shown by the records?

A. I have.

Q. Will you tell me what those amounts are?

Mr. Graff: Just a moment. I will object to any analysis that this witness may have made unless it is based upon the records which are in evidence, and that he then point out exactly what books he is referring to and what entries; and

the further objection that his analysis is a conclusion and is not a statement of fact.

The Court: Well, I understand that this witness is an accountant and has had many years' experience,—has devoted several years to an examination of the books and records now in the court room. Why do we have a witness of that character except to make an explanation for the benefit of the Court and jury? So you may proceed, but let me say this, when you refer to records, give the exhibit number and page, or the number of the entry so that counsel can follow you and so that the testimony given by you may be identified in these records.

The Witness: I understand, Your Honor. Government's Exhibit 159-A bears entry August 31, 1947, designated "R.L.B." in the amount of $10,000.00, a debit to this account which is "Notes payable, individuals." This would indicate that "R.L.B." had withdrawn $10,000.00 from this account.

Government's Exhibit 159-B —

The Court: What are you testifying from now?

The Witness: McCarthy's Cafe general ledger, Your Honor. (Continuing) — carries an entry dated August 31, 1947, where "R.L.B." is credited with $10,000.00. It is the same transaction. In brief, she drew $10,000.00 out of her advance account and placed it in her investment account, but there was no stock issued at that time. For that reason, we left it in the advance account and did not increase the stock account.

The Court: Well, you left it in the account in which you found $38,500.00, which was reduced by $12,500.00?

The Witness: That is right.

The Court: Leaving $26,000.00 in the advance account, do you call it?

The Witness: That is the advance account. Now, if I were to follow this transaction wherein Mrs. Banks made arrangements for the purchase of additional stock, I would transfer that $10,000.00 over to her investment account, but since —

The Court: (Interposing.) That is, the records then would show that she had bought $10,000.00 worth of stock, or stock to the extent of $10,000.00?

The Witness: That is right. But as far as dollars and cents are concerned, it did not matter which account it was in, and since no stock was issued to Mrs. Banks at the time she made the transfer to the investment account, it is more proper to leave it in the advance account than it is to call it an investment.

The Court: Well, I am not a bookkeeper but I wanted to understand the transaction. These lawyers may know all about it, but I do not.

Q. (By Mr. Lord.) Mr. McKusick, now, in your analysis, based upon the things which you have mentioned here, did you arrive at a figure showing Mrs. Banks' investment in that corporation for the various years?

A. I did.

Q. What was her investment in that corporation as of December 31, 1942?

Mr. Graff: May the witness again, Your Honor, when he answers this question, refer us to the exhibits that he uses in making that answer so we can follow him?

The Court: Be very careful to do that, Mr. McKusick.

A. The record showed no investment by Rita Banks in 1942.

Q. (By Mr. Lord.) Have you examined the capital stock register with reference to that matter?

A. I am looking at the capital stock register.

Q. Well, now, help me out, Mr. McKusick. What did you understand? Will you tell me if you found anything—let me finish the question, if you please, counsel.

Mr. Graff: I am sorry, I thought you had finished.

The Court: Go ahead.

Q. (By Mr. Lord.) Will you tell me what you did find showing her equity in McCarthy's St. Louis Park Cafe not represented by advances but by what you charged under investment?

A. I would have to refer to my notes.

Q. Well, will you do that, please, to refresh your recollection?

A. (Witness refers to notes.) My analysis showed —

Mr. Graff: Pardon me, Mr. McKusick. I understood the question to be — what he found in certain records, not what the analysis was.

The Witness: May I quote from Government's 221?

Mr. Graff: I suppose that is not a record of McCarthy's —

The Court: (To the witness.) You may tell what Rita Banks had in stock in this corporation December 31, 1942. That was the question.

A. $7,364.14, but that was in the nature of an advance. The stock was not issued to Rita at that time.

The Court: Well, you mean that the corporation owed her that much money?

The Witness: That is right.

Mr. Graff: Pardon me. May the record show that this figure was apparently produced by the witness out of a personal notebook that was not testified to — he is getting it, Your Honor.

Mr. Landrum: He is getting it. If you will wait just a minute, he will get it for you.

Mr. Graff: I am very patient; I will wait.

Mr. Lord: If the Court please, I believe that I have succeeded again in asking a question that is impossible for the witness to answer and I would like —

The Court: Well, don't apologize. Ask one that he can answer.

Mr. Lord: Yes, sir.

Q. (By Mr. Lord.) Mr. McKusick, what did you find to be the investment in this company of Rita Banks for the period ending December 31, 1942?

Mr. Hoffmann: May the record show whether the question is directed to the witness' knowledge from the books, and, if so, what book, Your Honor, so our cross-examination may be pursued?

The Court: Well, that is the one that he has devoted so much time to a few minutes ago —

The Witness: That is right. My analysis of this corporation's records concerning the investment account of Rita Banks showed that on December 31, 1942, she had a credit balance of $7,364.14.

Q. (By Mr. Lord.) Now, on the next year, December 31, 1943, what balance do you show?

A. The advance account shows a zero balance because the total balance of $11,864.14 was transferred to the investment account from the advance account and stock was issued in that amount to Rita L. Banks. The account remained constant for the period 1943 through 1947 in the amount of $11,864.14.

Q. Well now, Mr. McKusick, have you had occasion to amend the computations which you made on the bottom portion of Government's Exhibit 221?

A. I have explained that.

Q. Have you already explained that?

A. I have.

Q. Mr. McKusick, in order to clear the record, I should like to ask you again with reference to the B. & S. Company. You have stated that you made a computation with respect to that company, with respect to the equity in that company by this taxpayer and his wife, did you not?

A. That is right.

Q. Now, help me if I am repeating myself here — did you state into the record what figures you arrived at as a result of those computations showing the equity in that company of Thomas or Rita Banks?

A. The interest —

Mr. Graff: Pardon me a moment. I assume that you want Exhibits 218 and 219?

The Witness: Whatever the B. & S. Company are.

Mr. Graff: May the witness now refer to those exhibits when he answers this question, as I assume he is going to use them for the answer so that we know where he is going to get them from?

Mr. Landrum: I don't know what the witness is going to use, Your Honor. I assume he will use whatever he deems best to do it with.

The Court: Yes, but he should give the reference so that counsel may be able to follow him.

Q. (By Mr. Lord.) Well now, there are two companies, are there not, — Banks & Shepard and B. & S.?

A. B. & S. Corporation.

Q. B. & S. Corporation? A. That is right.

Q. Now, what exhibits do you hold in your hand?

A. 218, 219, and 220.

Q. And which corporation do they have reference to, Mr. McKusick?

A. They refer to a partnership.

Q. What is the name of that partnership?

A. Banks & Shepard. This is wrong —

Q. Let the record show that the witness withdraws his reference to Exhibit 220 and now refers only to Government's Exhibits 219 and 218.

A. Is there a question?

Q. Is this your note, Mr. McKusick (indicating)?

A. It is.

Q. (Continuing) — in your handwriting. Will that serve to refresh your recollection as to your computations made with respect to this company?

A. It will.

Q. Now, based upon Government's Exhibit 218 and 219, can you tell me what figure you arrived at as being the investment of Thomas or Rita Banks in the Banks & Shepard Company?

Mr. Hoffmann: If the Court please, and for the purpose of the record, may there be noted our general objection to the testimony now sought from the witness concerning Exhibits 218 and 219 on the ground heretofore stated, to-wit, that they do not represent the best evidence?

The Court: I understand that objection. It is overruled.

Q. (By Mr. Lord.) I direct your attention particularly, Mr. McKusick, to December 31, 1941.

A. The balance December 31, '41, as shown on Government's Exhibit 218, page 1 thereof, — a balance of $4,538.87.

Q. Now you have stated —

A. (Continuing.) The balance is in error — either through inadvertence or negligence the bookkeeper failed to enter the profit and loss for the period 1939, 1940, and 1941 until April 30, 1942. In order to arrive at a correct balance, December 31, 1941, it was necessary that I add $140.90 to that balance.

Q. And what was your total result then, Mr. McKusick?

A. $4,679.77.

Q. Based upon those exhibits, were you able to arrive at balances of investments in that company for the year 1942, December 31st thereof?

A. *The balance showing on page 1 of Government's Exhibit 218* shows $6,332.32, which is also an understatement for the same reason as explained previously about 1941. The profit and loss entry for the year was not entered until January 1, — January 1st of the subsequent year in the amount of $464.64. This amount added to the balance showing on Government's Exhibit 218, corrects Rita Bank's investment account to $6,796.96.

Q. As of what date?

A. That is as of 12-31-42. Now, in 12-31-43, there was no change.

Q. What is the figure which you take there as not being changed?

A. $8,677.84.

Q. Is that on Government's Exhibit 219?

A. That is on page 2 of Government's Exhibit 218.

Cross-Examination

By Mr. Graff:

Q. Mr. McKusick, you testified under date of May 21st, in respect to certain matters, and you told us some of your previous experience before being employed by the Bureau of Internal Revenue?

A. That is right.

Q. In connection with your background you advised us that at one time you were employed in the Unjust Enrichment Unit of the Bureau of Internal Revenue in connection with the so-called "Windfall Tax," which was imposed as a result of the invalidation of the programs, the agricultural adjustment programs?

A. That is right.

Q. And this so-called Windfall Tax attempted to recapture some 80 per cent of the amount that processors had in their hands at the time of the invalidation of the Act?

A. That is right.

Q. And your particular part in that investigation or work was in connection with wheat processors?

A. *I believe I testified in pork and wheat.*

Q. Pork processors and millers, — that is, wheat processors?

A. That is right.

Q. You stated in connection with that testimony that you generally end up with a tax, — was that your testimony?

A. That is right, in connection with that type of a tax.

Q. I see. So after your experience with the Bureau of Internal Revenue in connection with the so-called Windfall Tax, you then started your work in the Bureau of Internal Revenue as a Special Agent in the Intelligence Unit?

A. That is right.

Q. Starting your work sometime in March of 1941?

A. March 15, 1941.

Q. Now, in connection with your duties in the Intelligence Unit, you make certain investigations that are not made by so-called revenue agents, is that correct?

A. That is right.

Q. In that particular case isn't it a fact that prior to your assignment of it, there were revenue officers working on it?

A. I think that is right.

Q. Those revenue officers were by the name of Melbostad and McCart working under the direction of Mr. Hanson at Minneapolis?

A. That is right.

Q. When you got into the case, it was necessary for you in order to assume some jurisdiction to get the returns which were then in the hands of Mr. McCart and Mr. Melbostad?

A. That is right; with this exception, the group was directed by former special agent E. J. Barry, who made those decisions.

Q. He was the gentleman from Texas, was he not?

A. That is right.

Q. So following your assignment to these matters, you retrieved, if I quote you correctly, the tax returns which were then in the hands of Mr. McCart and Mr. Melbostad?

A. And others.

Q. Yes. And when was it that you started to work on the case involving the taxpayer Thomas Banks?

A. I believe sometime about April — may I refer to my diary?

Q. Surely.

A. (Witness refers to diary.) On April 2nd.

Q. 1946? A. 1946.

Q. Did you then, after commencing on April 2, 1946, have this matter — and by "this matter," I mean the matter involving the taxpayer Thomas Banks — as a matter that you were investigating as a special agent in the Intelligence Unit?

A. This taxpayer was one individual of a list of about eight or ten that we were investigating.

Q. Yes. And your investigation, then, of this taxpayer started on April 2, 1946 and continued until sometime in late 1951 when you submitted your report?

A. No, I would not say that.

Q. What would you say as to the period of time that you had worked on it after starting work on it on April 2, 1946?

A. I was assigned to the investigation of individuals, including this taxpayer, on April 2, 1946, and during all of the year 1946 and most of the year 1947 we worked collectively with no particular assignment made to any particular special agent.

Q. Well, in the final analysis, or in the final progress of it, you did wind up as the particular agent who did complete the investigation which was started by a group together with other taxpayers on April 2, 1946, correct?

A. I wound up with this taxpayer and several others.

Q. And did you complete your investigation insofar as this taxpayer was concerned sometime in the late fall of 1951?

A. I think it was July or August.

Q. Well, if you have your diary there and you wish to refresh your recollection, I have no objection to your doing it.

A. (Witness refers to diary.) Well, I have a notation here on August 22, 1950, that the investigation was far enough completed so that the taxpayer should be interrogated.

Q. I think on your direct examination you indicated that a meeting had been had with the taxpayer in Mr. Weinstock's office —

A. (Interposing.) This is '50 I am giving you now, and on June 4, 1950 we had an appointment with the taxpayer that if he had an explanation, he had an opportunity to come in and make his explanation.

Q. Yes. Well, did you have any such meeting during 1951?

A. No, the taxpayer never appeared.

Q. You had a meeting at one time in Mr. Weinstock's office?

A. That is right, the one I just explained.

Q. Yes. That was in 1950?

A. No, that was '51.

Q. In '51. And it was after that date that your final report was submitted?

A. That is right.

Q. When you were at Mr. Weinstock's office with Mr. Banks, you told him that you were at the point where you were going to wind up your report and that you did not want to rush him?

A. That is right.

Q. You were going to be gone for a few weeks?

A. Two weeks.

Q. And after that, why, if he wanted to say anything, you would be glad to hear it?

A. That is right.

Q. You told him at that time you were going to the northern part of the state, to Mahnomen, I believe?

A. That is right.

Q. And that was in 1951? A. '51.

Q. That is right. So then you made your, submitted your final report in this matter sometime after that?

A. That is right.

Q. Which would be in the latter part of 1951?

A. No, I do not think it was — if you call August the latter part — it was about August that the report was submitted.

Q. Well, was it August, '51?

A. Yes.

Q. All right. And notwithstanding the submission of your final report in August of '51, if that is the date that is now established, was there further investigatorial work that was done by others in the Bureau of Internal Revenue?

A. I believe within the last month there were some inquiries made.

Q. Yes, and that investigation was conducted by you and other agents of the Intelligence Unit of the Treasury Department, isn't that true?

A. That is right.

Q. And isn't it also true at the same time there was some additional investigation made by revenue officers, — Mr. Kleven, for example?

A. That is right.

Q. Mr. Titus? A. That is right.

Q. And some others. Now, you will remember that when you told us that you had to make some determinations as to how you would proceed in this investigation, — do you recall that testimony, Mr. McKusick?

A. Where I applied different methods, the different approaches to the problem —

Q. (Interposing) Yes. A. I do.

Q. You directed our attention in connection with that testimony to Section 41 of the Internal Revenue Code, did you not?

A. That is right.

Q. Under Section 41 of the Internal Revenue Code, provision is made how net income shall be computed?

A. That is right.

Q. And the provision of law provides that if a method employed by a taxpayer does not reflect income, the computation can be made in accordance with a method as in the opinion of the Commissioner of the Bureau of Internal Revenue would reflect such income, isn't that correct?

A. That is right.

Q. Mr. McKusick, did the Commissioner, — the then Commissioner of the Bureau of Internal Revenue — ever make a determination of how this investigation shall be conducted of this taxpayer, having in mind the provision of Section 41 of the Internal Revenue Code?

Mr. Landrum: That is objected to, if the Court please, as calling for a conclusion of the witness, making a lawyer out of him. It is immaterial. We are in this court room under an indictment by a Grand Jury, whether the former Commissioner of Internal Revenue got us in here or not.

The Court: I think that question is objectionable to this witness. (To the witness.) You are not a lawyer?

The Witness: No, sir.

The Court: The objection is sustained.

Mr. Graff: I would like to refer the Court to the direct examination where he testified to that very fact.

The Court: No. I sustained the objection, counsel.

Mr. Graff: May I just have a moment, please, Your Honor?

The Court: Yes.

Mr. Graff: May I approach the Bench a moment, now, Your Honor, to make an offer?

The Court: Yes.

(The following proceedings were had at the Bench, outside the hearing of the jury:)

The Court: Let me see what you have there.

(Copy of transcript handed to the Court.)

The Court: You may make your record.

Mr. Graff: If the Court please, at this time we make the following offer of proof: We offer to prove by the cross-examination of this witness that this witness had no specific authority from the Commissioner of the Bureau of Internal Revenue, as testified by him in his direct examination, under date of May 21, 1952, such testimony being found on his direct examination at page 118 of the record.

Mr. Landrum: The offer is objected to upon the ground and for the reason, first, it is improper as to form, being general in nature, second, upon the ground and for the reason that the evidence sought to be adduced is absolutely incompetent. We are in court under indictment by a Grand Jury. It is evident that he must have received instructions in his official capacity.

The Court: The objection is sustained.

(Whereupon, the following proceedings were had in open court:)

Q. (By Mr. Graff.) Now, in connection with your direct examination, Mr. McKusick, you testified that you had exhausted certain methods of determining the tax liability, if any, and your testimony was that you first tried the direct income method?

A. That is correct.

Q. Would you be good enough to explain in a little bit more detail for us what you mean by the "direct income" method?

A. The direct income means that a specific item of income is omitted from the taxpayer's return. He may have sold a horse or a cow and not reported the proceeds. He may have worked at some plant and not reported the earnings therefrom.

Q. And was it your testimony, Mr. McKusick, that you found that the so-called direct income method would not work in this case?

A. I believe my answer to that question was that the omitted direct income found was unimportant.

Q. Yes. So that as a result of your examination, you found no important omission of direct income from the taxpayer's returns for the years '45, '46, and '47?

A. You see, direct income is the method — specific items. I found little or no specific items of unreported income.

Q. Yes, I put the word "important" in. That is correct?

A. That is correct.

Q. Then the next method you referred to was the so-called "bank deposit" method?

A. That is right.

Q. And you describe that as the gross deposits method, and you indicated that that method was discarded as being inequitable both to the taxpayer as well as to the United Sates, is that correct?

A. That is correct.

Q. The bank deposits' method is simply a matter of using deposits made in banks by taxpayers?

A. That is correct.

Q. And the next method that you referred to was the so-called receipts and disbursements method, which I think you indicated was a variation of the bank deposits as well as the direct income method?

A. That is correct.

Q. Now, the receipts and disbursements method is, as the name implies, the taking of all disbursements and comparing them with all receipts that a taxpayer may have received, whether those are reflected in bank accounts, or whether they are reflected in other items of direct income which have now found themselves into bank accounts?

A. That is correct.

Q. And I think your testimony was that the so-called receipts and disbursements method, so described, — you also discarded that as being inequitable both to the taxpayer as well as to the government?

A. That is correct.

Q. Then the next method that you told us about was what, — do you remember?

A. Wasn't it the net worth method?

Q. Well, in your testimony you didn't come to the net worth method. Was there any other method referred to other than the ones that we have mentioned?

A. May I refer to my notes?

Q. Surely.

A. (Witness checks notes.) Testimony.

Q. I beg your pardon?

A. Testimony.

Q. And what do you mean by "testimony"?

A. I mean that there were several bars and other places in Minneapolis in which the taxpayer was rumored to have an interest. I interviewed the stockholders of those bars under oath. I obtained no information with reference to the taxpayer. It was inconclusive in that I couldn't tell whether those stockholders were telling the truth or whether Mr. Banks actually had no interest in the bar and the rumor was unfounded. So I discarded the testimony approach to a determination of Mr. Banks' income.

Q. Yes. The so-called "testimony" approach is the approach whereby you run down, shall we say, certain rumors and certain allegations that are made by individuals?

A. "Old wives' tales."

Q. Old wives' tales, all right. Then you proceeded to work this from the standpoint of so-called net worth method?

A. That is right.

Q. And as you explained this morning, Mr. McKusick, in the employment of the so-called net worth method, you have to have an appropriate and an accurate starting point?

A. You are correct.

Q. And it follows, I take it, Mr. McKusick, that in the employment of the so-called net worth method, that if you do not have an accurate and a proper starting point you cannot make a case by the so-called net worth method?

A. That is right.

Q. Now, so that by the net worth method to start off with, with your starting point or your anchor, you must first establish the accuracy of your starting point?

A. Yes, you must.

Q. And in connection with your investigation you conducted an examination of numerous books and records of business places, of banks, and of different kinds of people that are engaged in one business or another?

A. I did.

Q. Now, Mr. McKusick, when you testified the other day, you indicated that at the inception of the investigation you and a number of other agents were assigned to make an investigation because of alleged so-called graft payments made to certain Minneapolis officials?

A. I did.

Q. Now, Mr. McKusick, isn't it a fact that as a result of the investigation which you made, that you found no payments of any kind by the taxpayer Tom Banks to any of the so-called officials in Minneapolis?

A. That is correct.

Q. During the period of the investigation, Mr. McKusick, it is also true, is it not, that you knew that Mr. Weinstock was preparing the tax returns for Mr. Banks and Mr. Wein-

stock was also doing certain accounting work for places like the Blue Goose, McCarthy's, Flour City Body, and other companies?

A. That is right.

Q. And with that knowledge and that information, and you being an investigator out looking for certain facts, it was natural for you that you would then go to see Mr. Weinstock since he may have had certain information or certain books and records which you would like to examine?

A. Generally I would look at who signed the return first.

Q. And I think the returns in evidence here indicate that Mr. Weinstock did sign the returns for the taxpayer?

A. That is right.

Q. I think I will check those to make sure.

(Exhibits 1 to 11, inclusive, handed to Mr. Graff by the Clerk.)

Q. On Government's Exhibit 6, which is the return of Tom Banks for the year 1942, it does not appear on the return who made up the return for him, does it?

A. That is right.

Q. But now handing you Government's Exhibit 7, which is for the year 1943, it appears there that Mr. Weinstock made the return for Mr. Banks?

A. It does.

Q. And the same is true of Government's Exhibit 8, which is the '44 return?

A. It is.

Q. And the same is true for Government's Exhibit 9, which is the '45 return?

A. That is right.

Q. And the same is true of Government's Exhibit 10, which is the '46 return?

A. It is.

Q. And the same is true of the 1947 return, which is Government's Exhibit 11?

A. That is right.

Q. So armed with that information, it was most logical for you to go to see Mr. Weinstock?

A. That is right.

Q. And at Mr. Weinstock's office you found that he also had records pertaining to these other businesses that I have mentioned, like McCarthy's, Flour City, Blue Goose and others?

A. That is not true.

Q. Oh, I am sorry. Did he have any of the records of those companies when you went to see him, Mr. McKusick?

A. We analyzed the individuals' returns and from those returns we ascertained the investments Mr. Banks had. We then requisitioned the income tax returns of those ventures and from those returns ascertained that Mr. Weinstock prepared them. We then went to Mr. Weinstock's office with a list of ventures that we knew that he had from returns filed.

Q. I see. So then also you then knew that Mr. Weinstock had made returns for some of the other companies in which you were interested?

A. That is right.

Q. Now, directing your attention to a meeting which was held in Mr. Stone's office — I think sometime in 1950, possibly late in 1950 — do you know the meeting I have in mind?

A. No. I was in Mr. Stone's office for several meetings late in '50.

Q. Well, the meeting—

A. Who was there and I will look it up?

Q. The meeting I am referring to is where Mr. Meshbesher was present, Mr. O'Gordon, Mr. Stone, yourself, I think Thomas was there, and I think Mr. Masica was there. Do you have the date of that meeting?

A. My diary shows, and I quote, "Conference — Joe O'Gordon, Meshbesher, Thomas, Stone and I on T. W. Banks."

Q. And the date?

A. August 22nd. Do you want the rest of the memorandum?

Q. Yes.

A. "O'Gordon as spokesman stated he would prefer that the questions be submitted in writing."

Q. Now, the meeting in Mr. Stone's office had, of course, been prearranged?

A. That is right.

Q. And Mr. Stone, by way of identification, is Arthur Stone who is the head of the Intelligence Unit in this district?

A. Arthur A. Stone.

Q. And the meeting was held in his office, which is on the tenth floor of the new Post Office Building in St. Paul?

A. That is right.

Q. Now, isn't it a fact, Mr. McKusick, that the purpose of the meeting which was held in Mr. Stone's office on August 22, 1950, was for the purpose of determining and settling, if possible, the civil tax liability, if any, of Thomas W. Banks?

A. That is not true.

Q. That was not your understanding?

A. That is not my understanding.

Q. And isn't it true that at this conference held on August 22, 1950 in Mr. Stone's office, that it was agreed among the conferees that you have named that certain questions would be submitted to Mr. O'Gordon, and I think they decided that you should make up the questions? Isn't that right?

A. That is right.

Q. And, as a matter of fact, you later did make up the questions and under date of December 12, 1950, submitted the questions to Mr. O'Gordon?

A. That is right.

Q. And those questions have been introduced into evidence here as Exhibit 70. They are a copy of the questions

but they have been identified as the questions which you made up?

A. That is right.

Q. And then sometime later — I think sometime in February — Mr. O'Gordon submitted to you certain answers to most of the questions, but not all?

A. That is right.

Q. And I think that is in evidence here as Exhibit 71.

(Government's Exhibit 71 handed to Mr. Graff by the Clerk.)

Q. (Continuing.) And on Government's Exhibit 71, when you received it, you put a note on it that you received it from Mr. O'Gordon on February 1, 1951 and then signed your name?

A. I did.

Q. And Exhibit 70, which I now have, is the copy of the questions which you had submitted to Mr. O'Gordon on December 12, 1950?

A. That is right.

Q. Now, when you made up the questions represented by Government's Exhibit 70, Mr. McKusick, did you have the answers to these questions obtained as a result of your investigation?

A. I wouldn't say I had all of the answers. I had the answers to most of the questions.

Q. I see. So you had the answers to most of the questions when you submitted them, is that right?

A. That is right.

Q. And so it was your idea that since you had the answers that you would nevertheless submit the questions and see what happened to them?

A. That isn't quite true.

Q. Well, since you had the answers to the questions, can you please tell me what good purpose might be served that you saw in submitting these questions that you knew the answers to?

A. Well, I was speaking as an accountant. I had the answers to them but I didn't have that "last grain" that goes between what would satisfy an accountant and what would satisfy an attorney in the presentation for evidence.

Q. So, shall we say, that you felt you had the answers but you didn't have them quite to the last grain that you would have liked to have them?

A. That is correct.

Q. And was it the purpose of the conference held on August 22, 1950 to permit you to try to get this last grain that you wanted?

A. That is right.

Q. I see. So the conference in Mr. Stone's office, according to your interpretation, was set up for you to complete your investigation?

A. Not entirely. There was a disagreement during the conference regarding the reason for the conference. The — if I could explain it —

Mr. Landrum: Go ahead and explain it.

Mr. Graff: Well, counsel, may I suggest that you ask him when he becomes your witness?

Mr. Lord: You have asked the reasons for the conference. Why don't you let him explain it?

The Court: Now, just a moment. We will not have any argument across the table. (To the witness.) You may answer that question further if you desire.

A. It began, I would say, early in July or the latter part of June. I called on an attorney in Minneapolis by the name of Simon Meshbesher — this call was probably the 25th or the 30th call on Simon Meshbesher — regarding Mr. Banks' interest in various ventures in Minneapolis. There was a clash of personalities. Mr. Meshbesher stated that he was getting sick of me coming around continually on this investigation.

The Court: (To the witness.) Be as brief as possible.

A. (Continuing.) And I said that, "You are sick of it? What about me?" — and there was a sharp exchange that isn't relevant, and Mr. Meshbesher ended up by saying that, "Why can't we get together?"

I said, "Any such conference, if you mean to lay your client's cards on the table, — such a conference would have to be in Mr. Stone's office in St. Paul."

Now, the actual meeting was delayed because of the absence of W. H. Thomas, who was in charge of that fraud investigation in Minneapolis, and it didn't occur until the date mentioned there, August 22nd. At the time of the meeting, when we had all been seated and I explained the background and the reason for the conference, Mr. O'Gordon stated that he didn't understand that that was the reason for the conference. Well, I said, "Joe, what is the reason for the conference?"

"Well," he said, "I don't want to get anybody in trouble."

I said, "Wait a minute. Throw it out in the middle of the rug there and we will kick it around, if you have got some different impression." — and he made no statement whatever. That was the conference on August 22nd.

Q. (By Mr. Graff.) Well, is it a safe statement to make that everybody was not in agreement in the conference on August 22, 1950?

A. There was no reason, no fundamental reason, for anyone in the conference not to have an understanding as to the reason for the conference. The innuendo raised, but not proven, had no bearing on the conference whatever.

Q. Anyway, as a result of the conference, it was decided that you would write up certain questions which are now on Exhibit 70?

A. That is right, — I was making the investigation.

Q. Yes. Then on February 1st, Mr. O'Gordon gave you the answers as they are now incorporated on Exhibit 71?

A. That is correct.

Q. Now, when you asked the first question: "How much cash did Mr. Banks have on hand July 2, 1937?" — Mr. O'Gordon in the answer did not answer that question?

A. That is right.

Q. Did you have the answer to that question when you asked it on December 12, 1950?

A. No, I said that there was a little grain that I didn't have.

Q. I see. And was it another grain, so to speak, in the "B" part of question 1, — "How much cash did Rita Lee Banks have on hand July 2, 1937?"

A. That is right.

Q. That was also not answered by Mr. O'Gordon?

A. That is right.

Q. And did you have the information to answer question 1(B) when you submitted the questions on December 12, 1950?

A. That is question 1(B)?

Q. That is the one about Rita Lee Banks.

A. Oh, no, — I still don't have the answer.

Q. I see. Now, Mr. McKusick, I will direct your attention to question No. 20, of Exhibit 70. That question is: "How much cash was in the possession of Thomas W. and/or Rita L. Banks as of December 31, 1947?" — and that question was likewise not answered by Mr. O'Gordon?

A. Yes.

The Court: (To the witness) What is the answer?

The Witness: It was not answered.

Q. (By Mr. Graff) Now, did you have the answer to that question when you submitted the questions on Exhibit 70 to Mr. O'Gordon on December 12, 1950?

A. I had a part of the answer.

Q. But you didn't have all of it?

A. No, — I had all I needed.

Q. I see. Was that part of the answer?

A. No, I had cash on hand December 31, '47.

Q. And you have not so far, if I recall your testimony, proved any amount of cash on hand yet as of December 31, 1947, have you?

A. I have proved a check on hand, which is the same as cash.

Q. I see. That is your understanding of it, in any event. Now, at the time that you were examining these various books and records, such as the books and records of the partnership of Banks & Shepard, and the so-called B. & S. Corporation, did you make photostats of all of those exhibits at that time, or cause them to be made?

A. I can't recall what particular records we photostated at what particular time.

Q. Well, during the period of investigation, did you photostat other records than the ones that have been introduced here this morning, or today, as Exhibits 218, 219 and 220?

A. That is right.

Q. So that you have had in your possession photostat copies of these documents during the period of the investigation?

A. Which documents do you mean? Describe the documents. I mean, my statement is that from time to time during the entire investigation from 1946 through November or December, 1950, I would obtain records and make photostats. I can't say that I had records which were photostated in '50 from 1946.

Q. Yes, I understand. Now, some reference has been made here to the books, or certain records of Music Installations, Inc. Do you have photostats of copies of the records of that corporation?

A. I do not.

Q. You have produced here certain records of Banks & Shepard, a partnership. Do you have other records of Banks & Shepard, a partnership, than exhibits 218, 219, and 220?

A. I believe we have a photostat of Rita Banks' partner, Harry Shepard's investment account in the same partnership.

Q. I see. The so-called Banks & Shepard partnership was Rita Banks and Harry Shepard?

A. That is correct.

Q. It was not Tom Banks?

A. That is right.

Q. And the so-called Banks & Shepard partnership had to do with a certain building on Nicollet Avenue, did it not?

A. It owned and operated the property located at 1316, 18, and 20 — Nicollet Avenue.

Q. And that was the only so-called property in the Banks & Shepard partnership?

A. It was the only asset the partnership had.

Q. There are certain tax returns that are in evidence here of the so-called Banks & Shepard partnership?

A. That is right.

Q. Now, do you have photostatic copies of records of the Coin-A-Matic Amusement Company?

A. I do.

Q. As part of your investigation into this matter, you made an investigation into the situation surrounding the Casablanca Cafe, Inc., is that correct?

A. I did.

Q. And the successor, the Casablanca Cafe, not incorporated —

A. I did.

Q. The successor, Shanghai Cafe?

A. I did not.

Q. You made no investigation of that?

A. I made inquiries and rejected the investigation.

Q. Now, you also, in the course of your investigation, made investigations of the books and records of the Flour City Body Company, did you not?

A. That is correct.

Q. Did you also make certain photostats of records of the Flour City Body Company?

A. That is the same question, isn't it?

Q. Whether you made photostats of it—

A. I don't believe we made photostats of the records of the Flour City Body.

Q. And you also had available to you in connection with your examination the records of the Power Brake & Equipment Company?

A. We did obtain some checks of the Power Brake & Equipment Company and had them photostated.

Q. I see. So it was only checks with respect to the Power Brake & Equipment Company?

A. That is right.

Q. Now, the books and records of the Banks & Shepard were turned over to you by Mr. L. L. Peterson?

A. That is right.

Q. Who was Mr. L. L. Peterson?

A. He was an accountant.

Q. Well, I think you indicated on your examination that he didn't have an office, — that he worked from his home?

A. That is right. He was also known as "Bud" Peterson. Other description than that, I can't give you.

Q. Bud Peterson?

A. Bud Peterson. He is listed in the directory under L. L. Peterson.

Q. And it was the same Mr. Peterson that delivered to you certain records pertaining to the books of Banks, — the B. & S. Corporation?

A. That is right.

Q. Was Mr. Peterson the accountant who kept and made the books for the Banks & Shepard partnership, as well as the B. & S. Corporation?

A. That is right.

Q. And he is the Mr. Peterson who made the tax returns of these — either the partnership or the corporation as the

case may be — and it was from there that the income items, those particular things were picked up in the tax returns of Tom Banks where he received the money, or Rita Banks where she received it?

A. Well, that is quite a question. May I hear it again?

Q. Well, never mind. Were you in court the other day when Mr. Weinstock testified?

A. I was.

Q. And he referred to certain corporations, or partnership returns were made available to him where he could pick up the income that was reflected by those returns, and then he would incorporate that into the individual tax returns of Tom Banks or Rita Banks?

A. That is correct.

Q. Those would be samples or examples of that situation?

A. That is right.

Q. Now, you have indicated to us, Mr. McKusick, what you regarded as being certain conclusions from books and records which have been introduced here in evidence, is that right?

A. There is a play between facts and conclusions there. It was not a conclusion.

Q. Well, let me say that whatever you arrived at, you embodied it on Government's Exhibit 221 insofar as McCarthy's were concerned?

A. That is correct.

Q. Now, in connection with Government's Exhibit 221, I do want to go into with you at some length the source of other entries on this exhibit. Now, on Exhibit 221 is the name of J. J. Keegan. Is there a Keegan in the books of McCarthy's?

A. No, there is a Keegan in the books of the Casanova, — or was at that time. He was the manager, that is, the office man for Casanova Bar & Cafe.

Q. Now, I understood that Exhibit 221 was a statement of the amount of money that was invested by certain people,

according to your analysis, in McCarthy's St. Louis Parl Cafe, Inc.?

Mr. Lord: If the Court please, this exhibit was offered only insofar as it reflected the investments of Thomas Banks and Rita Banks. Now, that is as far as we have offered it here. I believe counsel is inquiring of other matters which concern allocations of investments to other individuals not connected with this case.

Mr. Graff: If the exhibit was so limited, Your Honor, —

The Court: Just go ahead and examine the witness. The objection is overruled.

Q. (By Mr. Graff.) Now, is there an account in McCarthy's under the name of J. J. Keegan?

A. I believe so.

Q. Would you find it for me, please.

A. The sheet which I analyzed is Government's Exhibit 159-F, but I also had access at that time to Leonard H. Weinstock's work papers, which work papers may have corrected the money amount now shown in the amount of $5,000.00 to Theodore Culbertson, 12-14—

Q. Now, in Government's Exhibit 221, right next to the Keegan matter, is a Theo. Culbertson, which is, I think, the one that you referred to when you explained the Keegan thing on Government's Exhibit 159-F?

Mr. Lord: (To the witness.) Take your time now, Mr. McKusick and find the correct page.

The Court: Perhaps the witness can find it between now and 10 o'clock tomorrow morning.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 27, 1952. Appearances are as has been heretofore noted.

Tuesday Morning Session, May 27, 1952, 10:00 o'clock A.M.

(Appearances as heretofore noted.)

Mr. Graff: I think, Your Honor, there was a question pending when we closed last evening.

(The last question was read.)

A. That is not true. I re-examined Government's Exhibit 221 and compared it with the general ledger, which is Government's Exhibit 159. The money which I have credited to J. J. Keegan should have been credited to J. Keefe. Neither Keegan's entry, which is an error, or Keefe's, which is correct, has any effect on the investment of Rita or Thomas W. Banks.

Q. (By Mr. Graff) Is it a fair statement then, Mr. McKusick, that Exhibit 221 is in error when it lists a J. J. Keegan as having made an investment in McCarthy's Cafe?

A. That is correct.

Q. By the way, when did you prepare Government's Exhibit 221?

A. I believe it was the latter part of '49 or the fore part of 1950.

Q. And the condition of the ledger, McCarthy's ledger, Exhibit 159, was in substantially the same condition as it is now?

A. Yes,—you see the corporation is on a fiscal year and I was adjusting to calendar year ending December 31, '47, and the entries had been made sufficient to determine what the balances were at the end of 1947.

Q. The entries that you analyze on Exhibit 221 were the same entries that were on the books when you examined them in 1949?

A. That is correct.

Q. So that is, it is a fair statement to say that you made a mistake in putting Keegan down, J. J. Keegan, on that Exhibit 221?

A. That is right, instead of Keefe.

Q. Yesterday in court, I called your attention to the entry on Exhibit 221. It is the last entry, 10-31-47 of $25,000.00.

A. That is right.

Q. If I understood your testimony correctly yesterday, you said that you have found out in connection with the settlement of the case involving Harry Shepard that that entry was in error and should only be $12,500.00, is that correct?

A. Insofar as Rita Banks is concerned.

Q. The total of $25,000.00 that is now on Exhibit 221,—half of that figure was given credit to this Harry Shepard in your settlement with him, was it not?

A. That is right.

Q. So on Exhibit 221, at least insofar as the $25,000.00 entry to which I have called your attention,—that is incorrect and it should state only $12,500.00?

A. That is correct.

Q. Is Exhibit 221 in your handwriting?

A. It is.

Q. I notice that at the bottom of 221 there were apparently some figures written but they have been erased in part at least. You do not contend, I take it, that they constitute any part of Exhibit 221?

A. No. The exhibit at the time I prepared it had questions—I mean there were circumstances which required that questions be asked and this notation which I made at the bottom of Exhibit 221 deals entirely with the entries made up here under Coin-A-Matic.

Q. I just wanted to make sure that they were not a part of the exhibit.

A. No.

Q. Now, I think it was in answer to a question—I forget who asked it of you—that you said in relation to that $25,000.00 item that—you stated that Harry Shepard had admitted that he had advanced $12,500.00 and that a settlement of Harry Shepard's case was made by you in 1951?

A. That is correct.

Q. In order that all of us may understand what a settlement means, do I understand that term to be as you used it, the arriving at an agreement of an amount of tax which is owed and then the case being closed out on that basis?

Mr. Lord: That is objected to, Your Honor, as being not within the scope of the direct examination and irrelevant to the issues in this case. Harry Shepard's case has nothing to do with this case except insofar as he has claimed certain assets. If counsel proposes to inquire further into that aspect of it, we have no objection, but if we are going to hear every case this agent has had anything to do with, we are going to be here a long time.

The Court: Why is this material?

Mr. Graff: If the Court please, over my objection, this witness went into the settlement with Harry Shepard to support his claim concerning the $25,000.00 check and to support his testimony that the entry on 221 was in error because Harry Shepard told him he had advanced half that money.

The Court: Well, did he say anything more than that a settlement of Shepard's case had been made? I think that is all he said. There is no dispute about that.

Mr. Graff: He said "settlement." I am simply asking what he meant by that term.

The Court: Well, he may explain what he meant by that term, briefly.

A. In 1951 we made a determination of Harry Shepard's income. The amount which we arrived at was agreed by Mr. Shepard and the taxes were paid.

Q. (By Mr. Graff) And that has been the end of the matter?

A. That is correct.

Q. As a part of that settlement, there is a consent of some form that the taxpayer signs and then the taxes are assessed on that basis by the Collector's office?

A. That is correct.

Q. And there is no proceeding of any other kind pending with respect to that matter?

Mr. Landrum: That is objected to, if the Court please. It is objected to for pure prejudice.

The Court: The witness has stated that there was a settlement in 1951.

Mr. Graff: That is right, Your Honor.

The Court: And the taxes paid and it was terminated and there is no use wasting any more time on it.

Mr. Graff: I am not objecting to the ruling of the Court, Your Honor. I am objecting to the objection that counsel made about prejudice.

The Court: Well, the record has been made. We will proceed with something else.

Q. (By Mr. Graff) In connection with the so-called net worth approach that you made, you testified somewhat yesterday regarding assets and liabilities, is that correct, Mr. McKusick?

A. That is correct.

Q. And if I understood your testimony correctly, you testified that as far as you were concerned, you did not find any so-called accounts receivable?

A. That is incorrect.

Q. Did you testify that there were certain funds which were owing to the taxpayer?

A. The testimony, I believe, had to do with an abstract net worth case.

Q. Well, let me ask you this question, Mr. McKusick: As a part of your investigation, did you find that there were

certain moneys which were due and owing to the taxpayer as of the beginning point of your net worth computations?

A. We did not.

Q. Mr. McKusick, isn't it a fact that if there were obligations due and owing the taxpayer as of the beginning of the net worth period, your net worth beginning point would be off to that extent?

A. In the abstract, that would be correct.

Q. Yes. In other words, if you said that at the beginning point of the net worth case nobody owed him any money and, as a matter of fact, somebody owed him, shall we say, a thousand dollars, and you did not have that in there,—then your beginning point would be off to the extent of $1,000.00, isn't that correct?

A. In that respect all I can say is that we made a diligent search.

Q. Well, I mean, just answer my question.

A. That would be right, in the abstract.

Q. Yes, that is right. Now, isn't it also true, Mr. McKusick, that in your so-called beginning of your net worth that you arrived at a certain amount of cash that the taxpayer had as of the beginning net worth period?

A. We asked the taxpayer—

Q. Now, wait a minute. Didn't you—you have made your computations, now?

A. That is right.

Q. You have arrived at a certain amount of tax, have you not?

A. At the end of the period.

Q. You arrived at no amount of cash as of the beginning of the net worth period?

A. That is correct.

Q. I see. Mr. McKusick, isn't it true that if the taxpayer, as a matter of fact, had a certain amount of cash as of the beginning of the net worth period, your net worth starting point would be off to the extent of that cash?

A. We simply went by the taxpayer's affidavit.

Q. I think you can answer that yes or no.

A. If he did have it would be—

Q. (Interposing) Yes, assume that he did have.

A. That is an abstract question.

Q. That is right. For example, if you started out with your net worth at your beginning point and you had $100.00 in cash and actually the taxpayer had a thousand dollars in cash, your beginning net worth would be off to the extent of $900.00, would it not?

A. That is correct.

Q. Surely. Now, you indicated that your investigation started as of April 2, 1946?

A. I indicated that the group investigation started April 2, 1946.

Q. Yes, I meant the group, and more intensive activity on your part was later?

A. The latter part of '47.

Q. Yes. So shall we say that your investigation of this taxpayer was more concentrated in the latter part of 1947?

A. That is right.

Q. Now, as a part of your investigation, which became more intensive the latter part of 1947, it was necessary for you to find in your beginning net worth what the picture was as of the beginning of that net worth?

A. That is right.

Q. So if you started the latter part of 1947 and your beginning net worth was December 31, 1936, it would be necessary for you to go back eleven years approximately?

A. That is right.

Q. So that any investigation that you conducted as of the latter part of '47 had to try to ascertain the facts as they existed some eleven years ago?

A. On a diminishing basis, eleven, ten, nine, eight,—

Q. Yes,—shall we put it the other way,—as far as the '45 return?

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A. That is right.

Q. It had to be two years less?

A. That is right.

Q. And as far as the '46 return, one year less?

A. That is right.

Q. And as far as the '47 return, it had to be eleven years less?

A. That is right.

Q. Isn't it true though, that you were making it in 1947?

A. Not entirely.

Q. What do you mean?

A. May I explain?

Q. Surely.

A. In 1947 I had the benefit of a previous examination through the years '33 or '34, which was settled in 1937. I used the results of that investigation, which was agreed to by the taxpayers. I adjusted to the affidavit that he filed in 1937. There was very little differential. Each proved the other. The affidavit in effect proved the result of the tax investigation which was agreed to. The results of the tax investigation corroborated the affidavit.

Q. Then as a matter of fact, you had and did go back more than eleven years,—you went back more years than that?

A. I went back to a stipulation of tax settlement in 1937.

Q. Yes. Well—

A. (Interposing.) I did not go back to 1920 or '21 and '22, when the prior investigators made their investigation. I just used the results of their investigation.

Q. I see. So then actually you went back eleven years?

A. Yes.

Q. Regardless of what you may have used, you had to go back eleven years?

A. For some items. Some items ten, some nine, and some eight.

Q. Which items eight?

A. Well, I mean—

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Q. Which items eight years ?

A. The idea as—

Q. (Interposing.) Just tell me what years?

A. You subtract the years. You see, I went back eleven years for the investigation.

Q. Yes, and you tell me for which return did you only go back eight years? It had to be nine, ten or eleven, didn't it?

A. That is right.

Q. Not eight?

A. All right.

Q. That is right. Now, so that when you started out in the latter part of 1947, you had on the average to go back to try to find out what certain facts were as of December 31, 1936?

A. What certain facts were, that is right.

Q. Yes. And as a part of your investigation, you got into this so-called Casablanca affair, did you not?

A. I did.

Q. And you found as a result of your investigation, did you not, that Tom Banks was the owner of, I think, 90 shares of stock of a total of 180 shares?

A. I believe the record will speak for itself.

Mr. Graff: Well, may I have Exhibits 70 and 71, please?

Q. When you say the record, you mean these exhibits?

A. That is right.

(Exhibits handed to Mr. Graff by the Clerk.)

Q. Mr. McKusick, I am reading from Government's Exhibit 70, and I am reading from question 18. Preceding question 18 you have a number of statements which preface the question, is that not correct?

A. That is correct.

Q. So I will read the preface first before I read the question. Now, these questions and these prefaces were all your preparation? I mean you prepared them?

A. That is right.

Q. They decided that at that conference —

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A. (Interposing.) They decided that the questions would be in writing but it went without saying that I would prepare the questions since I was making the investigation.

Q. They also decided that you would have to do the work of preparing them?

A. There was no decision like that. It was just natural. It was inferred. I was making the investigation. They just decided that the questions would be submitted in writing instead of a personal appearance of the taxpayer.

Q. I see. Well, then, shall we say you dictated—

A. (Interposing.) When the decision was made, I formulated the questions, propounded them.

Q. All right. "This investigation disclosed that on June 30, 1945, the capital stock outstanding in Casablanca, Inc. was held as follows: Thomas T. Gleason, 56 shares; F. J. Wickers, 90 shares; Herman Mitch, 34 shares. Total, 180 shares. On August 8, 1945, Mr. William Donnelly deposited $20,000.00 in currency to his account with the First Produce State Bank, and on the same day tendered his certified check, presumably for the purchase of the Casablanca. He operated it for a time, sold all but inventory to some Chinamen operating as Toung-Poy, who subsequently sold it to A. B. Percansky for $42,500.00. From the sale of the property to Toung-Poy and from the sale of the inventory to others, Mr. Donnelly realized approximately $43,000.00, a portion of which was retained by him and the balance presumably used to retire obligations of the corporation which were assumed at the time he made his original investment, i. e., notes payable individuals in the amount of $31,000.00 as of December 31, 1945."

Now, is when the figure 18 comes and the first question pertaining to that, and this is the question—

A. (Interposing.) There were several sub-numbers.

Q. Yes. That is the first one I am reading now, question 18: "Did Mr. Banks have any interest in the stock of the corporation shown above nominally held in the names of

Thomas P. Gleason, F. J. Wickers and Herman Mitch? Specify the nominee and give date and amount of investment.

"Answer: Owned stock in name of Wickers."

So that the question and answer indicated that Mr. Banks was the owner of 90 shares of Casablanca, Inc., is that right?

A. That is right.

The Court: What was the answer?

The Witness: That is correct, Your Honor.

Q. (By Mr. Graff.) Now, isn't it a fact that the so-called cashier's checks represented by the group of exhibits which have been identified as Exhibit 117—they have different numbers but they are all 117—that went to Leonard Weinstock, represented at least a partial payment for the interest that the stockholders of the Casablanca had in those assets?

A. On a prorata basis.

Q. Yes. So that those checks in the 117 group, at least in part, represented a return of principal—

A. (Interposing.) To all the stockholders.

Q. Yes. So that on that basis, Thomas Banks, of that amount, would be entitled to receive 50 per cent, Gleason would be entitled to receive 56/180ths, and Herman Mitch would be entitled to receive 34/180ths.

A. After the liability which was assumed by Mr. Donnelly was retired.

Q. Yes. And the only liabilities that Mr. Donnelly assumed, if any, were the obligations which secured the loans on the liquor which was in the warehouse?

A. And the matter of $31,000.00 which was loaned to the Casablanca Corporation between the dates, August 8, 1945, and December 17, 1945.

Q. Well, by whom—

A. (Interposing.) And before the stockholders received anything there should be some settlement with this other liability.

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Q. Well, for our purposes here, the cashier's checks in the 117 group represented prorata partial return on investment to Tom Banks, is that right?

A. You cannot say that without recognizing the payments on that $31,000.00. That was assumed by Donnelly who followed the corporation. He took it in his investment account.

Q. Mr. McKusick, did you find out as part of your investigation that the stock in the Casablanca was issued in the year of '40 or '41?

A. I do not recall the exact date.

Q. Well, was it around that time?

A. It cannot be around two different dates so far apart.

Q. Well—

A. (Interposing.) I would say off-hand it was closer to '42.

Q. I see. Your best recollection is it was sometime in '42?

A. Yes.

Q. Now, when you asked that question No. 18,—I have not read all of it. I only read part of it,—did you know the answers to that question when you asked it?

A. No.

Q. This was one of those grains that you still did not have?

A. That is right.

Q. And with respect to the $20,000.00 that Mr. Donnelly had when he purchased the Casablanca, you also asked whether Mr. Banks had any interest in that $20,000.00, did you not?

A. I did.

Q. And the answer was that Mr. Banks had no interest?

A. That is what he answered.

Q. Yes. Did you have the answer to that question also when you asked it?

A. No.

Q. That was a grain also that you were missing?

A. That is right.

Q. You asked the question: "Did Mr. Banks receive funds from L. H. Weinstock as Trustee for William Donnelly in the liquidation of his Casablanca Cafe venture?

"Answer: Yes."

Did you also know the answer to that question when you asked it?

A. I had a part of the answer.

Q. I see. What part did you have?

A. A check that went to the Daily Mail.

Q. And did you talk to Mr. Welsh about that check?

A. No, I tried to locate Mr. Welsh and I could not locate him.

Q. I see. So your investigation for the period during the entire time failed to locate Mr. Welsh, is that correct?

A. That is correct.

Mr. Graff: May I have Exhibit 215, please?

(The exhibit was handed to Mr. Graff.)

Q. So I understand that despite your investigative efforts, you were unable to locate Mr. Welsh?

A. That is right.

Q. As a part of your investigation, didn't you ascertain the fact that he had been and probably was a newspaper man?

A. That is right.

Q. Formerly associated with the Minneapolis Tribune and the Minneapolis Star?

A. That is right.

Q. And that he had gone directly from this Minneapolis Tribune and Star to this so-called venture, the Daily Mail?

A. That is right.

Q. And associated with him in that venture of the Daily Mail were two other persons, were there not?

A. I was not interested in anyone else but Welsh. I do not know how many other people were in it.

Q. I see. Well, now, the Daily Mail was a newspaper which was proposed to be published in the Twin Cities, was it not?

A. That is right.

Q. And when you found the check which was payable to Len Welsh, did that investigation lead you to the Daily Mail?

A. To the discovery that the Daily Mail was out of business.

Q. Mr. McKusick, you can probably help me a little bit,—I hand you Government's Exhibit 215 which has been identified as a check to Len Welsh, and I will ask you whether there is anything on that exhibit which brings or mentions the Daily Mail?

A. There is nothing that mentions the Daily Mail.

Q. Well, was it an assumption on your part that the check represented by Government's Exhibit 215 was to be used for the Daily Mail?

A. That is right. For our purposes, as an advance by Mr. Banks, it was immaterial whether it went to the Daily Mail or Welsh.

Q. Mr. McKusick—

A. (Interposing.) We have Welsh and the Daily Mail mentioned.

Q. I see. Now, Mr. McKusick, in the course of your investigation of this matter, how many checks did you find payable to Mr. Welsh by Mr. Weinstock as Trustee?

A. I believe there were two.

Q. And so far the Government has only introduced in evidence Exhibit 215, is that right?

A. I have not kept track of what has been introduced in evidence.

Q. Well, you can take my word for it that this is the only check so far that has been introduced.

A. If you say it is, all right.

Q. And from your investigation are you able to tell us whether the funds represented by Government's Exhibit

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215 came from funds in the hands of Leonard Weinstock as Trustee for Mr. Donnelly?

A. I could answer that question if I could look at my memorandums.

Mr. Landrum: Look at them.

(Witness leaves stand to secure records.)

A. (Continuing.) There is no proof that this money came from William Donnelly.

Q. (By Mr. Graff.) I think my question was whether there was anything on Government's Exhibit 215 from which you could conclusively establish the fact that the proceeds of that check came from funds in the hands of Leonard Weinstock as Trustee under that power of attorney which was given to him by Mr. Donnelly? There isn't, I take it?

A. There isn't.

Q. And as a part of your investigation, did you determine whether Mr. Welsh or the Daily Mail, or both of them, repaid any portion of the funds represented by Government's Exhibit 215?

A. I do not believe there were any repayments at the time I looked at the Daily Mail ledger.

Q. I see. Now, you did not contact Mr. Welsh, however—I mean, you could not find him?

A. No, I could not find him.

Q. So that you do not know, as far as Mr. Welsh is concerned, whether he received these funds, and whether he paid them back, or what he did with them?

A. I had evidence to form a fair conclusion.

Q. I see, but you did not get the answer from Mr. Welsh?

A. That is right. I made enough investigation to determine that Mr. Welsh was without funds when he left town.

Q. I see. When he left town,—you found that he left town?

A. He had left town prior to the time I began to make inquiries here.

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Q. And had he left town by the end of 1947?

A. No. The Mail was operating, I believe, in '47.

Q. Yes, so he was available at that time?

A. I did not make the inquiry on Len Welsh in '47.

Q. I see. But when you found out about Len Welsh, you could not find him?

A. When I got around to make the inquiry concerning the Trustee account on Casablanca, Len Welsh and others, the Daily Mail was defunct and Mr. Len Welsh had left town.

Q. You made no investigation of Len Welsh to determine whether he—

Mr. Lord: (Interposing.) That is objected to as being repetitious, Your Honor. The witness has, I think, thoroughly explained what investigation he made with reference to Len Welsh.

The Court: Finish your question.

Mr. Graff: I wonder, Mr. Reporter, would you be good enough to read as far as I got.

(The question was read.)

Q. (By Mr. Graff.) (Continuing.) —made any repayments during the year 1947 of the proceeds of the check represented by Government's Exhibit 215?

The Court: You may answer that question.

A. I never had any contact with Mr. Welsh.

Q. (By Mr. Graff.) So the answer to my question is no?

The Court: No, that is not the answer to that question. As far as that answer goes, it states that the witness had no communication with Welsh.

Mr. Graff: Well, may I ask the witness then, again, whether he made any investigation from Len Welsh to ascer-

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tain whether he had repaid any portion of the proceeds represented by Government's Exhibit 215?

The Court: Well, now, the witness has said that he made no investigation of Len Welsh. That much ought to be settled.

Mr. Graff: Yes.

The Court: Now, if you want to know if he made other investigation as to whether or not this check was repaid, you may make that inquiry.

Mr. Graff: All right.

The Court: That is proper.

Mr. Graff: Will you strike out my question and let me ask this question:

Q. (By Mr. Graff.) In your investigation did you find whether any portion of the check represented by Government's Exhibit 215 was repaid during the calendar year 1947?

A. In my inquiries there was no repayment,—no money running from Len Welsh to Mr. Banks.

Q. So that you found no evidence of repayment?

A. That is right.

Q. Directing your attention further to Government's Exhibit 70, the following question is asked in question No. 17:—there is a slight preface to the question, which I will read, but let me show it to you before I read it.

(Document shown to the witness.)

A. Yes.

Q. (By Mr. Graff.) "On November 29, 1944, Mr. Hollen purchased an SR-6 Stinson Plane in Oil City, Pennsylvania, for $5,000.00. In an affidavit dated July 12, 1949, Mr. William Volding, pilot, stated that the plane operated by Metropolitan Airways was used to transport roses from California to Minnesota."

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Question 17: "Did Mr. Banks have any interest in the above-described plane or floral business? State dates and amounts of investment."

"Answer: No interest or knowledge."

Now, did you know the answer to that question before you asked it?

A. I did not.

Q. And so that you did not know the answer to that question at all, is that right?

A. That is right.

Q. And these questions, if I recall correctly, were submitted on December 12, 1950, is that right?

A. I believe that is the correct date.

Q. And you had been investigating the matter in some shape or other ever since April 2, 1946,—having in mind that the original phase of the investigation was this so-called group investigation, and your investigation became more intensive the latter part of 1947?

A. That is right.

Q. So after that preliminary investigation from April 2, 1946 to the latter part of 1947, and then your intensive investigation from the latter part of 1946 until December 12, 1951, you did not know the answer to this question that I just read?

A. I had a lot of information about the answer to the question.

Q. Well, I think you have testified that you did not know the answer to the question.

A. That is right, I did not have that much of it.

Q. I see. Despite your investigative efforts over the periods of time that I have indicated?

A. That is right.

Q. You knew as a result of your investigation that Herman Mitch was one of the stockholders of Casablanca, Inc.? I think I may have asked that question. Did I ask you before?

A. I do not recall.

Q. I see. Well, let me ask it now to make sure. You found that from your investigation?

A. I found that Herman Mitch was nominee from some shares of stock in the corporation.

Q. And he was not active in the operation of it?

A. He was listed as manager.

Q. Yes, and did you find in your investigation that Mr. Mitch had negotiated the lease for the premises on the place that was operated as the Casablanca?

A. That may have been.

Q. I mean, didn't you so find from your investigation?

A. I thought the Casablanca was a corporation.

Q. Yes. My question is this: Did not you find from your investigation that Mr. Mitch negotiated the lease for the building in which the Casablanca was operated?

A. I cannot recall that I did.

Q. You cannot recall that. Didn't you find as a result of your investigation, Mr. McKusick, that prior to the opening of the Casablanca that Herman Mitch was indebted to Tom Banks?

A. No, not at all during the entire investigation.

Q. Didn't you have some conversations with Leonard Weinstock in which he advised you of that fact and indicated that a portion of the payments in the so-called 117 group went as part of repayments of previous indebtedness of Herman Mitch to Tom Banks?

A. That first came up when Mr. Weinstock appeared before the U. S. Attorney and the case was in progress. It happened not more than two or three weeks ago. Mr. Weinstock told me that Mr. Mitch had repaid $19,000.00 into this account. All during the period of the investigation there was no disclosure made from any source whatsoever.

Q. In any event—

Mr. Landrum: (Interposing.) Just a moment, if the Court please.

POOR COPY

Mr. Graff: Well, just a moment.

Mr. Landrum: I want to get that date definitely when Mr. Weinstock told him that.

The Court: You may give the date, if you can.

The Witness: I do not have the precise date, Your Honor, at the time Mr. Weinstock presented the cancelled checks of the Weinstock Trustee account which is at the Lincoln Bank,—at the time he brought them in to Revenue Agent Kleven and I, he explained then that there was $19,000.00 that Mitch had repaid.

The Court: That was about three weeks ago?

The Witness: No more than three weeks ago, Your Honor.

The Court: Proceed, Mr. Graff.

Q. (By Mr. Graff.) In Government's Exhibit 70, consisting of the questions, was this question—the question No. 9, and there is a statement or a preface preceding the actual question—"Mr. and Mrs. Banks are the lessees to Lots 5 and 6 of the Hungry Jack Summer Group in the Superior National Forest. This investigation disclosed that the main lodge was erected in about 1930 and acquired by the taxpayer subsequent thereto, and that a boat house and a garage-care-taker building, were erected and sundry ground improvements made by the taxpayer."

9, Question: "State date and amount of original investment in this property and date of construction and cost of garage-caretaker building (1930), boat house (1939); and date and cost of grading and development of grounds, docks, walks, and entrance driveway."

"Answer: Original investment about $1,000.00; garage $2,000.00; boat house, $200.00; labor, $400.00; plus labor of T. Banks. Road graded at no cost."

BLEED THROUGH

Q. Now, did you have the answers to that question when you submitted the original questions to Mr. O'Gordon on or about December 12, 1950?

A. We had what we could have used in lieu of an answer. We had the benefit of an inquiry of the forestry office. We had the tax,—copies of the tax bills. We did not have an estimation on the value of the labor of T. Banks.

Q. Now, didn't you find as a part of your investigation, Mr. McKusick, that Lots 5 and 6, referred to in your question No. 10, are the property of the United States?

A. That is correct.

Q. And that Tom Banks leased Lots 5 and 6 from the United States—

A. (Interposing.) I do not believe that is correct. I think Rita Banks.

Q. Rita Banks leased it?

A. I think Rita Banks leased those.

Q. In other words, it is a lease from the United States?

A. That is right.

Q. It is an arrangement under which you can lease land from the Government and you can put a building on it and is a situation that is not at all uncommon in the northern part of the state?

A. That is right.

Q. Now, did you in connection with your investigation investigate or examine the tax returns of a novelty company, —the Northwest Novelty Company?

A. I do not recall. There were ventures which Mr. Banks was rumored to have an interest in that we made an investigation of and it would be dropped if it could not be proven that Mr. Banks did have an interest in it. Now the Northwestern Novelty might come under that category.

Q. I see. Well, do you recall, Mr. McKusick, whether you made any investigation or examination of the tax return for 1946 of the Northwest Novelty Company?

A. No, I did not make that examination. I might have made an inquiry of it.

POOR COPY

Q. Mr. McKusick, I direct your attention to Government's Exhibit 10, which has been identified as the 1946 tax return of Tom Banks, and on the first typewritten sheet under partnership, isn't there an item "Northwestern Novelty Company, Minneapolis", where income is reported, $1,312.50?

A. That is right.

Q. Well, now, didn't you, as a part of your investigation, then, go to the return of the Northwestern Novelty Company to see whether they had paid that amount to Tom Banks, or any amount to ascertain the correctness of the return filed by Tom Banks?

A. The revenue agent may have.

Q. You did not do it?

A. I do not recall that I did.

Q. Well, did I understand originally that when you got into this case under date of April 2, 1946, that one of the first steps that you did was to use your language "Retrieve the returns from the revenue agent," and then examined all the sources of income disclosed by the return?

A. They were surveyed for that purpose.

Q. So do I understand you now that you did or you did not examine the return of the Northwestern Novelty Company for the year 1946?

A. Are you talking about examining the return as a revenue agent examines a return or are you talking about looking at the return?

Q. I am talking about your investigation. Did you examine the return and make some examination of the return of the Northwestern Novelty Company for the calendar year 1946 or the fiscal year, which would encompass this payment, if they were on a fiscal year basis?

A. Yes, we looked at the return, I did, and we got what books that were available.

Q. I see.

A. I do not recall that the books were too important so—

Q. And may I ask you, Mr. McKusick, as a result of your

investigation, what did you find out about that item reported in Government's Exhibit 10 from the Northwestern Novelty Company in the sum of $1312.50?

A. It is possible that it was accurate to the penny with the partnership return of the Northwest Novelty Company.

Q. Well, you say it is possible. I want to know what the fact was. Do you know what the fact was?

A. When I made the investigation, we made notes and incorporated the details in our main report. Once an item is in the report, I do not presume to remember in detail what each fact and figure of the report,—it may be that that particular item was surveyed and found that the books were inadequate for use as evidence and we rejected them. It may be one of those cases.

Q. Did you, as part of your investigation, which commenced originally in some phase as early as April 2, 1946, and became more intensive in the latter part of 1947,—did you make any investigation to determine the investment, if any, that Tom Banks had in the Northwestern Novelty Company located at Minneapolis?

A. We may have made an inquiry.

Q. Well, you say you may have made an inquiry.

A. Yes, sir.

Q. As you sit there now, you do not know whether you made such inquiry or not?

A. I do not. I know that everything on Mr. Banks' returns was followed down to it source. It may be that as I previously explained the money he reported from Northwestern Novelty Company agreed with the amount shown as distribution on the partnership return, and it may be that the books were not available, or in too bad order to make a comprehensive audit.

Q. Well, it may have been a lot of things, may it not?

A. Well, suggest some more.

Q. Yes,—in other words, you say it may have been—

A. (Interposing.) In brief, it was not used in the investigation.

Q. In other words, your answer is it may have been this or it may have been that, or it may have been this—as you sit there now, you do not know whether this item had any importance or not?

A. The item itself is unimportant and has no bearing on the case. The item is income and we made the case on a net worth basis.

Q. Now, wait a minute. You said that you made an investigation on the net worth, did you not?

A. Yes, that is right.

Q. Did you stop to investigate whether Tom Banks had any investment in the Northwestern Novelty Company as a part of your determination of net worth?

A. We must have.

Q. Well, did you?

A. I called on possibly 150 different ventures, both from rumors and from indexing from the income tax return. I cannot sit here now and tell you every venture that came in anonymously and everything taken from the return that I investigated.

Q. Mr. McKusick, this item is on black and white on Tom Banks' cash return for the year 1946. It is one of three items listed under "Income Partnership".

A. Yes, sir.

Q. Tell us—

A. (Interposing.) It is an item of income. It has nothing to do with net worth.

Q. Do you suppose for one moment, Mr. McKusick, that the Northwestern Novelty Company was paying Tom Banks an income of $1312.50 if he did not have something invested in that company?

A. Well, that is not income receivable. Now you take the matter of the Pearson News Service. There was no investment there.

Q. I see. Well, now,—

A. (Interposing.) Let me explain now to settle this issue.

Q. Okay, fine, you go ahead and explain it. Explain it fully.

A. Mr. Banks became a partner of the Pearson News Service.

Q. We are not talking about the Pearson News. We are talking about the Northwestern Novelty Company.

A. No, but you are making a large issue of this item which we must have examined because it is on the return.

Q. I do not know whether you examined it or not. I am simply asking you what you did concerning it,—what you did to determine the investment, if any, that Tom Banks had in the Northwestern Novelty Company?

A. I answered that. I said that if it is on the return, which it is, and I saw it, we followed it down to the source and it must have been that the income was properly shown on the venture's return and that the records were inadequate for an examination, or for use in ou—

Q. (Interposing.) Mr. McKusick, I am going to ask you this question once more: What investigation, if any, did you make to determine the investment of Tom Banks in the Northwestern Novelty Company of Minneapolis?

A. I personally made no investigation.

Q. All right.

A. The fellow who made the investigation, I believe, is George Zimmerman.

Q. Just a moment. I think you have answered my question.

Mr. Landrum: You say his name is Zimmerman. Is that the man sitting here?

The Witness: It might have been Zimmerman or it might have been Mr. Melbostad, but the inquiries,—the inquiries—I directed the inquiries.

Q. (By Mr. Graff.) Well, Mr. McKusick, you appreciate that I am not an auditor, nor am I an accountant.

A. That I do.

Q. My question was simple and I think you have answered it. You did not make—I am talking about you personally—did not make any investigation—

The Court: (Interposing.) He has answered that question several times. He said he did not.

Mr. Graff: All right. Thank you, Your Honor.

Q. (By Mr. Graff.) Mr. McKusick, on Government's Exhibit 70, question No. 21 reads as follows:—and I am reading first the preface to the question:

"On April 10, 1946, H. H. Clark and Thomas W. Banks purchased property located at 224 South Tenth Street, known as the Oriole Apartments, from the S. T. McKnight Company for $42,000.00. Of this total amount, $22,500.00 represented a loan from the Sons of Norway."

Now, question 21: "How much of the residue of purchase money, namely, $19,500.00, was advanced by T. W. Banks? Source."

"Answer: 50 per cent."

Now, did you have the answer to that question before you asked it?

A. I had the answer to the original figure.

Q. Do you mean the total purchase price?

A. You see—

Q. (Interposing.) You were in court the other day when Mr. Toman of the S. T. McKnight Company was here and brought in the large book showing it?

A. It was not Toman I made the inquiry of, though. It was another fellow. I personally made the inquiry.

Q. I see. So you had the information when you submitted the question?

A. I had 95 per cent of it.

Q. It was an easy matter to check about the mortgage to the Sons of Norway?

A. That did not concern the matter of the Sons of Norway.

Q. No, I mean that was an easy matter to check, was it not?

A. Oh, yes, that was purchase money. I was interested in the cash, the currency.

Q. Yes. And the question was that Thomas Banks had advanced 50 per cent of it?

A. Yes.

Q. That was the answer you did not have?

A. No.

Q. You did not have that answer?

A. I had that answer.

Q. You had that answer?

A. Yes.

Q. So you asked the question even though you already had the answer?

A. I had 95 per cent of the answer.

Q. I see. You did not indicate in the question that you knew any proportion of the answer, 95 per cent, or at all? You just asked the question?

A. Would I indicate that I know 95 per cent of this answer,—or the 5 per cent?

Q. Yes. You did not indicate that.

A. It had no bearing on the question.

Q. (By Mr. Graff.) Now, Mr. McKusick, I understand that your starting point for the net worth was December 31, 1936?

A. That is right.

Q. And in conducting your investigation concerning the so-called starting point, did you use the affidavit of the taxpayer dated July 2, 1937, identified as Government's Exhibit 33?

A. We did.

Q. I presume that from time to time you examined the affidavit rather carefully?

A. We did.

Q. Now, Mr. McKusick, attached to the affidavit were a list of certain stocks, were there not?

A. There was.

Q. Now, handing you Government's Exhibit 33, if you will examine it, I am sure that you will find that it is dated July 2, 1937, is it not?

A. It is.

Q. And attached to Government's Exhibit 33 is a list of stocks, is there not?

A. Described as worthless.

Q. There are a list of stocks attached to the affidavit described as Government's Exhibit 33?

A. That is right.

Q. And did you notice in the course of your examination that while the affidavit is dated July 2, 1937, the attachment to the affidavit describes the affidavit as having been dated as of April 8, 1937?

A. I did not.

Q. You did not notice that before?

A. When the stocks were described as "worthless" we did not pay any attention to it.

Q. And notwithstanding your frequent use of Government's Exhibit 33, or a copy thereof, you never noticed that the date on the affidavit itself and the date referred on the list attached thereto were actually two different dates?

A. They were both within the same year, so it is immaterial.

Q. Yes. One was April 8th and one was July 2nd—

A. (Interposing.) Both 1937.

Q. Yes, but you never noticed it before?

A. I may have noticed it.

Q. If you did notice it before, did you make any investigation to find whether there was any reason for the discrepancy in the two dates?

A. I knew the reason.

Q. Oh, you knew the reason?

A. I knew the reason.

Q. Then you knew there was a discrepancy in the two dates?

A. It was immaterial.

Q. Did you know of the discrepancy in the two dates?

A. Can I explain it?

Q. Well, I think you can answer it yes or no.

Mr. Landrum: Let him explain it.

Mr. Graff: Just a moment, please.

The Court: Just a moment. I will run the Court yet. (To the witness.) You may answer.

The Witness: Answer his question?

The Court: Yes.

A. Yes, I did.

The Court: Well, did you desire to make some explanation?

The Witness: I did, Your Honor.

The Court: All right.

The Witness: This affidavit had to do with the compromise settlement of some $33,000.00 of distilled spirits tax, which the taxpayer and several others were involved in. They made a concerted offer in compromise of the $33,000.00 of some four or five thousand dollars, which was rejected by the Treasury Department, and they later reappeared in the form under—Mr. O'Gordon represented the case and increased the offer in compromise, which was accepted on July 2, 1937. Both instances bear on the same thing.

Q. (By Mr. Graff.) Did you check, Mr. McKusick, to find out whether there had been an offer in compromise dated April 8, 1937?

A. There was an offer in compromise about two or three months earlier than the one accepted.

Q. Now, I have heretofore asked you some questions concerning Exhibit 221, and I do not want to cover the ground that I have covered except that I have a question that I forgot to ask you, so let me hand you Government's Exhibit 221.

(Exhibit handed to the witness.)

Q. (Continuing.) And I again direct your attention to the item of $25,000.00 as of 10-31-47, representing the investment in McCarthy's St. Louis Park Cafe of Thomas W. or Rita Banks. Now, having that before you, let me read you from the questions and answers contained in Government's Exhibit 70, question No. 6. I am reading first the preface:

"It has been disclosed that on or about January 10, 1946, A. M. Cary purchased Thomas W. Banks' interest in National Plastics Corporation and National Sound Corporation, both New York City, for $25,000.00."

Now question 6 that follows that preface reads as follows: "How much of Mr. Banks' interest in the above-described stock was owned by Harry Shepard? Give date and amount advanced by Mr. Shepard.

"Answer: Thomas Banks' interest, 50 per cent of $25,000.-00."

Did you know the answer to that question when you submitted it to Mr. O'Gordon under date of December 12, 1950?

A. I did not.

Q. And when you received the answer from Mr. O'Gordon under date of February 1, 1951, did you then correct Exhibit 221 which you now have before you?

A. No.

Q. So that you have had the information with respect to that matter ever since February 1, 1951, and we are now in May of 1952, and the exhibit was introduced yesterday, and you still had not made that change on the exhibit even though you had the information for more than a year,—is that right?

A. The amounts used in our determination reflect a correction of that amount. They did reflect a correction.

Q. Well, now, I do not think that answers what I asked you.

The Witness: Read the question back.

(The question was read.)

A. That is right.

Q. I think you testified, Mr. McKusick, that as a part of your beginning net worth, December 31, 1936, you found and gave credit to the taxpayer for no cash as of that time, is that correct?

A. That is right. We used the affidavit and we made a diligent search and found no cash.

Q. Yes. So that in your beginning net worth, which is December 31, 1936, you have no cash—correct?

A. That is correct.

Q. Now, Mr. McKusick, isn't it a fact that as a part of your rationalization and your determination and your conclusion to use the so-called net worth system, that one of the reasons that you said you wanted to use that system was that this taxpayer used a lot of currency in his transactions?

A. That is right.

Q. So that you knew that when you started this investigation, whether it be on April 2, '46, or the latter part of 1947,—you knew that this taxpayer was one who dealt in currency a good deal, is that right?

A. But I did not know that he held currency.

Q. Just a moment. Isn't that a fact, that you knew that?

A. That is right.

Q. That is right. Now, and yet notwithstanding the use of that information to come to the so-called net worth method, when you come to your beginning net worth, you give him no cash at all as of the beginning of that period?

A. I used his own statement.

Q. Well, just a moment. Isn't that a fact what I asked you?

A. Well, the exhibit will speak for itself.

Q. Well, just a moment, Mr. McKusick. I asked you since you knew and so stated to this Court and jury that this man dealt in a large amount of currency from time to time and that it was for that reason that you had resorted to the so-called net worth method, and notwithstanding that knowledge and that information so used by you, when you started the net worth of this man, you did not give him credit for any cash as of December 31, 1936?

A. That is right.

Q. Isn't it a fact, Mr. McKusick, that when you established for this taxpayer as of December 31, 1936, no cash, that you knew in September of 1937 that this taxpayer had paid some $7800.00 in cash to the Collector of Internal Revenue at St. Paul, Minnesota?

A. I knew that from a statement of Joseph O'Gordon that the taxpayer had to borrow the money in settlement—

Mr. Graff: (Interposing.) Just a moment. I object to this witness testifying to any conversation with someone else. I am asking whether he knew that fact and I move that answer go out as hearsay.

The Court: The motion is overruled.

Q. (By Mr. Graff.) So you knew when you set this man up with no cash as of December 31, '36, that actually in September of 1937 he paid $7800.00 in cash to the Collector of Internal Revenue?

A. I did not know where he got it.

Q. Just answer my question. You knew that he paid it?

A. Sure, I knew that he paid it.

Q. Is that correct,—in cash?

A. I do not know what specie.

Q. Well, you made an investigation into this matter, did you not?

A. Are you talking about cash as distinguished from cashier's checks or somebody else's money that loaned it to him?

Q. What did your investigation reveal about the money which was paid the Collector of Internal Revenue in September of 1937?

Mr. Landrum: Now, answer it completely. He has asked you what your investigation revealed. Now, tell him.

Mr. Graff: Well, now, just a moment.

A. My investigation revealed that Joseph A. O'Gordon, who then represented the taxpayer on the power of attorney, stated to the investigation agent that his client would have to borrow the money to pay his taxes.

Mr. Graff: Just a moment. I object to this witness telling here what somebody else told him, Your Honor.

Mr. Landrum: He asked him what the information revealed, Your Honor.

Mr. Graff: I beg to differ with you, counsel.

The Court: Just a moment. We have had enough of this. I think the facts have been stated in connection with the payment of this tax in 1937. Now, you asked this witness what he learned on his investigation. He has stated what he found out from the lawyer who held the power of attorney from this defendant. I think that is going far enough.

Q. (By Mr. Graff.) Did you make an inquiry at the Collector's office in St. Paul concerning that transaction which occurred in September of 1937?

A. The inquiry—

Q. (Interposing.) Now, I think you can answer that yes or no.

The Court: Just answer the question, if you can.

The Witness: I personally did not, Your Honor.

The Court: Very well.

Redirect Examination

By Mr. Lord:

Q. Mr. McKusick, showing you Government's Exhibit 221, when did you make that?

A. In late '49 or early '50.

Q. What did you make it from?

A. The general ledger of McCarthy's St. Louis Park Cafe, Incorporated.

Q. Why didn't you change that exhibit as a result of information which you subsequently acquired?

A. The statement as prepared is an accurate reflection of the information I had obtained at that time. While I objected to the figure used in this determination in accordance with my explanation on Mr. Shepard's investment, I left this unchanged because Mr. Weinstock, the accountant for the taxpayer, took a copy at the time I completed the analysis.

Mr. Lord: That is all, Mr. McKusick.

GERALD O. KLEVEN was called as a witness and, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lord:

Q. Where do you live, Mr. Kleven?

A. I live at 5725 Vincent Avenue South, Minneapolis.

Q. And you are married, are you?

A. Yes, I am.

Q. What is your age?

A. 35.

Q. Where do you work?

A. I work as a revenue agent in the Bureau of Internal Revenue, Minneapolis office.

Q. And what particular type of work do you do there?

A. I specialize in the examination of cases in which fraud is suspected.

Q. And how long have you worked in that type of work?

A. About six years.

Q. Well now, can you tell me how your duties either correlated with or are distinguished from the duties of a special intelligence agent like Mr. McKusick?

A. Well, my duties are to examine returns and establish the true and correct income tax and/or penalties that may be involved in a civil case—civil liabilities.

Q. Well now, in connection with cases where you work with members of the special intelligence unit, what are your duties there?

A. I work under the direction of the intelligence unit officer.

Q. And what type of work do you do there?

A. Well, it is very similar—auditing the books and records of the taxpayers, see that they conform with the returns.

Q. Well, tell me, what is your educational background, Mr. Kleven?

A. I am a graduate from the University of Minnesota in 1938.

Q. And what degrees do you have from there?

A. Bachelor of Business Administration, with a major in accounting.

Q. And have you had any other formal education in accounting?

A. I have done some study since then and passed the Minnesota State Examination last fall for certified public accountant.

Q. Well now, Mr. Kleven, when you graduated from the University, what did you do then?

A. I worked for about six years in private industry as an accountant and office manager in a small manufacturing corporation.

I worked for six years with a small manufacturing concern in Minneapolis as accountant and office manager.

Q. What was the name of that concern?

A. The General Dairy Manufacturing Company.

Q. And when you left there, what did you do?

A. I went to work for the Internal Revenue.

Q. And you have been there since?

A. Yes, I have.

Q. When were you first assigned to the Banks' case?

A. Well, my first contact with the case was to obtain the returns and go over and see Mr. McKusick, and go over his papers and all the work that he had accumulated and done during the previous years.

Q. And how long have you worked on that case from January of 1951—how long did you work on the case then?

A. I worked with Mr. McKusick until I completed my report in about May of 1951.

Q. And then what have you done since then? When did you next work on the case?

A. Well, when I was called over here to work with the United States District Attorney in January of 1952.

Q. Have you been more or less steadily working on the case since then?

A. More or less, yes.

Q. State whether or not you ever examined the books and records of Brady's Bar?

A. Yes, I have.

Q. When was that?

A. About 1946.

Q. And was that in connection with the Thomas Banks' case particularly?

A. No, it wasn't. It was an examination of Brady's Bar, Inc.

Q. And was that a routine examination of Brady's Bar?

A. More or less routine, yes.

Q. Did you see their books and records?

A. Yes, I did,—I examined them.

Q. Where was this?

A. It was at Mr. Weinstock's office in Minneapolis.

Q. And did you at that time make any reference to an investment account on the part of Thomas Banks?

A. Yes, I did. I transcribed the investment account, or a loan account of Mr. Banks.

Q. And how did you happen to do that?

A. I was requested to do so by the intelligence department.

Q. Do you have such a transcript with you?

A. Yes, I have.

Q. Mr. Kleven, showing you Government's Exhibit 222, will you tell me what that is?

A. This is a general ledger account of T. W. Banks.

Q. Is that the transcript which you made?

A. Yes, it is.

Q. Would you say that that is an accurate transcript of the account named therein and from the books and records of Brady's Bar?

A. Yes, it is.

Q. Where are the books and records of Brady's Bar now?

A. I don't know.

Q. When did you last see them?

A. I think I saw them in 1951.

Q. And where, do you recall?

A. In the intelligence unit.

Q. Do you know whether or not those books were given back to Harry Clark, or Brady's Bar?

A. I don't know of my own knowledge but I believe they were.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 222.

(Exhibit handed to Mr. Graff.)

Mr. Graff: If the Court please, without examining the exhibit, having an opportunity to examine it, we object to the foundation for the exhibit. It appears, if I understand correctly, that this is a transcript made by Mr. Kleven. Now, this, then, constitutes secondary evidence and I do not believe that sufficient showing has been made to account for the original. It appears that the original books and records were in the hands of the Intelligence Unit in 1951.

The Court: (To Mr. Lord.) Why don't you lay a foundation?

Mr. Lord: I will do that, Your Honor.

The Court: You should always do that in introducing documentary evidence.

Mr. Hoffmann: If the Court please, to assist the Court and to expedite this trial, if the witness will by examination testify as to the authenticity of the proposed exhibit, we will waive our objection as to foundation.

The Court: Very well.

Mr. Hoffmann: We don't want to hold up the trial of this matter.

Mr. Lord: It is my understanding, Your Honor, that he has testified that he obtained these entries from the books and records—

Mr. Hoffmann: I understand that, Your Honor, but I think he should submit one more question that they are correct figures.

Q. (By Mr. Lord). Did you state that these were the correct figures?

A. I believe I did, but I will state again that they are the correct figures.

Mr. Lord: We have a return here—

The Court: Let me see that exhibit.

Mr. Hoffmann: We have no objection to the exhibit on the basis of foundation.

(Exhibit handed to the Court.)

The Court: You may proceed.

Mr. Landrum: That is received, Your Honor?

The Court: Yes.

Mr. Graff: If the Court please, we do object to it on the grounds of immateriality and lack of relevancy, but we withdrew our objection with respect to foundation.

The Court: The exhibit is received.

Q. (By Mr. Lord.) Mr. Kleven, showing you Government's Exhibit 222, what does it show with respect to the investment of Tom Banks?—or, correction—what does it show?

A. The information contained on this exhibit shows the balances due, or from Tom W. Banks to Brady's Bar, Inc.

Q. And for what years?

A. For December 31, 1941, December 31, 1942, and December 31, 1943.

Q. Would you give the amounts for those years?

A. As of December 31, 1941, there was a balance due and owing by Mr. Banks to Brady's Bar, Inc., of $6,934.42. As of December 31, 1942, there was a balance of $7,434.42 due and owing by T. W. Banks to Brady's Bar, Inc. As of December 31, 1943, there was a balance of $9,240.10 due and owing by Brady's Bar, Inc. to Mr. Banks.

Q. Now, Mr. Kleven, in the course of your investigation have you had occasion to examine the books and records of the B & S Company?

A. Yes, I have.

Q. And where was that?

A. I saw those books and records in the Intelligence Unit Office in Minneapolis in the spring of 1951.

Q. Now, Mr. Kleven, did you have an occasion to make any transcripts from those books and records?

A. Yes, I did.

Q. And which account, particularly, did you transcribe?

A. I transcribed some information from the minute book, the journal, and the general ledger.

Q. What was that with reference to?

A. With reference to the investment of T. W. Banks in the B & S Corporation.

Q. Now, Mr. Kleven, did you compile something from each of those three sources on one sheet of paper more or less?

A. In those two pieces of papers that are attached (indicating).

Q. Showing you Government's Exhibit 223, can you tell me what that is?

A. That is a transcript that I made of the B & S Corporation records that I referred to previously.

Q. Was the information which you copied on there copied accurately and concisely according to what you found in the books of that corporation?

A. Yes, it is.

Q. Do you know who was the vice president of the B & S Corporation? Do you know whether or not it would be Thomas Ewing?

A. The transcript would show who was the officer at that time.

Q. Do you know who is presently the officer?

A. No, I don't.

Mr. Lord: Your Honor, we have here a return "Not found" for one Thomas Ewing who we attempted to subpoena for the books and records of that corporation. The subpoena reads: "Thomas Ewing, Vice President of the B & S Corporation." We also have a subpoena for Simon Meshbesher and he has stated—he was in court and he stated that he did not have the books and records of that corporation, although their business address is listed as his office. We have another subpoena for Brady's Bar, 604 Hennepin Avenue, Minneapolis, Minnesota. There is no return shown on this. The Sheriff has not returned a "Not found" on it. I understand it was served upon the Secretary of State under the Minnesota Statutes.

At this time we offer in evidence Government's Exhibit 223.

(Exhibit handed to Mr. Graff.)

Mr. Graff: May I ask the witness a question concerning foundation, Your Honor?

The Court: Yes.

Q. (By Mr. Graff.) Mr. Kleven, it is my understanding that you saw the books and records pertaining to the B & S —this is the B & S Company, is it not?

A. Yes. It is a corporation.

Q. The name of the corporation is the B & S Company?

A. I believe that is correct.

Q. At the Intelligence Unit office in the spring of 1951, is that right?

A. That is right.

Q. Have you made any check to determine whether they are still at the Intelligence Unit office?

A. To my knowledge all of the original books that were in the Intelligence Unit have been brought back to the original owners.

Q. Well, did they get a receipt for them? Did the receipt indicate to whom they turned them over?

A. I don't know. I don't have too much knowledge of their procedure.

Q. Well then, you don't know what the Intelligence Unit did with the books that they had in the spring of '51?

A. No, I don't.

Mr. Graff: May we have a few moments to examine it, Your Honor?

The Court: Yes.

Q. (By Mr. Graff.) Mr. Kleven, you don't know whether the Intelligence Unit made photostats of these records? Did they at that time?

A. I do not know.

Q. The Exhibit 223 is something that a part of it you took out of the minute book, a part of it out of the journal, and part of it out of the general ledger?

A. That is correct.

Q. And the revenue office didn't cause it to be photostated, either?

A. No.

Q. Mr. Kleven, Exhibit 223 is your summary, is it not, of the examination that you made of those books in the spring of 1951?

A. A summary?

Q. It was your summary or interpretation of them?

A. I transcribed portions of the records of the minute book, and portions of the stock certificate record which shows the stockholders, and I transcribed the opening entry in the journal with regard to the purchase of the building, and I transcribed the capital stock balance in the ledger and the paid-in surplus in the ledger.

Q. Now, let me direct your attention to the small sheet on top of Government's Exhibit 223. There is a Roman numeral II and it says, "The B & S Company was incorporated on 12-2-43 under the laws of the State of Minnesota" and you have (minute book)?

A. That is right.

Q. Now, you didn't copy that, did you?

A. Not that heading there.

Q. You didn't copy this; you were making a summary of certain information, is that right?

A. In the first part of that statement, yes.

Q. And then you have the address—1234 First National Soo Line Building?

A. Yes.

Q. Now, isn't the address of Mr. Meshbesher—hasn't it been identified here as 1234 First National Soo Line Building? You didn't copy that correctly, did you?

A. 1234 First National Soo Line Building is what that is.

Q. That numeral is a "4"?

A. Yes.

Mr. Graff: Well, if the Court please, I think we will object to the exhibit on the ground that there has not been sufficient foundation to warrant the introduction of secondary evidence, which Exhibit 223 is, and it consists in part of an interpretation or a summary by this witness of some documents, books and records, and we make the further objection that they are therefore hearsay and self-serving; and we object to them on the further ground that they are irrelevant and immaterial.

The Court: Well, where are the books from which the data was taken?

Mr. Lord: Would that we knew, Your Honor. The Government would certainly not be in here trying to introduce that exhibit if we could find the books.

The Court: Well, have you any evidence to that effect?

Mr. Lord: Well, I could put Mr. McKusick on and he would tell you.

Mr. Landrum: We have got those subpoenas here, the subpoena duces tecum. We went after them in every way we could.

Mr. Lord: It is the same story on these books, Your Honor.

Mr. Hoffmann: Just a moment, if the Court please. We ask that that remark be stricken from the record and counsel admonished—

The Court: The statement of counsel may be stricken.

Mr. Lord: We have attempted to subpoena every officer we could find. In addition to that we have subpoenaed Mr. Meshbesher in whose office the books and records are. Mr. McKusick can produce,—will if the Court chooses that he do so,—a receipt showing that he returned those books to Mr. Weinstock, and I think this is discretionary with the Court as to what foundation we should lay and on the facts we submit that—

The Court: Do I understand that the books were delivered by the Intelligence Department, Internal Revenue office, to Mr. Weinstock and his receipt taken?

Mr. McKusick: It was.

The Court: The objection is overruled; the exhibit is received.

Q. (By Mr. Lord.) Now, Mr. Kleven, from your examination of the books and records of the B & S Company, and the notations and the excerpts which you made on Government's Exhibit 223, have you been able to arrive at a figure representing the investment of Thomas Banks or Rita Banks in the B & S Corporation for the various years 1943 through 1947?

Mr. Hoffmann: At this time, Your Honor, in addition to our other objection, objection is taken to the testimony

of this witness based upon this witness' use of Exhibit 223. We desire the record to show our objection to any testimony involving Rita Banks.

The Court: The objection is overruled. (To the witness.) You may answer.

A. I have made a schedule separate and apart from this exhibit in which I have shown the investment.

Q. (By Mr. Lord.) What does that show as being the investment for the year ending December 31, 1943?

Mr. Hoffmann: We ask that the record denote what counsel refers to when he says what does "that" show in the light of the witness' previous answer.

The Court: I think counsel might be specific in that question.

Q. (By Mr. Lord. Which Banks invested in that company?

Mr. Hoffmann: Just a moment, if the Court please. We object to that as calling for a conclusion and a characterization by a witness of an instrument received in evidence which speaks for itself.

The Court: You may answer the question, if you can.

A. What was the question? Repeat the question, counsel.

Q. (By Mr. Lord.) Which Banks invested in that company, Rita or Thomas?

A. Well, it shows certificate No. 3, issued January 9, 1946, 105 shares to Thomas W. Banks.

Q. Now, let me go back to the date December 31, 1943, and ask you—what investment is shown there, or what investment have you arrived at as being the investment—

Mr. Hoffmann: (Interposing.) Well, we object to that as calling for a conclusion, if the Court please.

Mr. Lord: Just a minute until I finish the question, counsel. (To the reporter.) Strike the question, if you please.

Q. (By Mr. Lord.) Will you tell me what your exhibit shows with reference to the investment of Thomas Banks and Rita Banks for the various years, year ending shown thereon?

The Court: You may answer.

A. Well, this exhibit of itself would have to be interpreted before it could be explained.

Q. (By Mr. Lord) All right, will you interpret it and tell us what it shows with reference to the investments of Thomas W. and Rita Banks in that corporation?

Mr. Hoffmann: May the record show our objection to his interpretation?

The Court: You may explain those records, if you can.

The Witness: All right.

The Court: Can you do so to a reasonable certainty?

The Witness: Yes, I can, sir.

The Court: Proceed.

Mr. Hoffmann: May the record show what papers the witness refers to for the purpose of now testifying so our cross-examination of him may be intelligently pursued?

The Witness: I have here a work paper which I have prepared and listing the entries as shown on this exhibit.

The Court: Exhibit 223?

The Witness: Exhibit No. 223.

The Court: Proceed.

The Witness: The opening entry is in 1944 in the journal and it includes as part of the investment, "Payment on

mortgage principal $200.00; mortgage expense, $148.00; legal fees, $500.00; " and a building which has been interpreted from the question No. 70 and 71—

Mr. Hoffmann: (Interposing) Now, if the Court please, we submit all of this is not responsive to the question and ask that it be ordered out of the record.

The Court: You may answer. Go ahead with your answer.

The Witness: And the question was as to the investment in the Kruze building—

Mr. Hoffmann: (Interposing) May we ask again for the purpose of our cross-examination what this witness is now reading from?

The Court: What are you using?

The Witness: This is the same work paper.

The Court: Very well.

The Witness: The Kruze Building, which was sold to the B & S Corporation in January of 1944 and which is part of this opening journal entry,—the question was: "Was payment on the Kruse Building of $6800.00," and the answer to that was, "Half invested by Tom W. Banks for $3400.00."

Mr. Hoffmann: Well, then Your Honor, so the record may be complete on behalf of the defendant, do we now understand that this witness is making these answers with respect to Exhibit 223 which he claims is a transcript of a so-called investment account upon the books of the B & S Company, a corporation, made by him, sometime previous hereto in the light of, and added to, if I may so state, Your Honor, by information that came to him from other sources and not from the books of the B & S Company?

The Court: Is that correct?

The Witness: That is correct. We are discussing the investment.

Mr. Hoffmann: If the Court please, in the light of the witness' answer we ask that all of his heretofore answers be stricken from the record.

The Court: That motion is overruled. (To the witness) Where are you getting the information?

The Witness: The information with regard to the investment of the taxpayer has to be taken from two sources, his original cost of this building, which he transferred to the corporation, plus the additional cash which he invested in the corporation.

The Court: Now, where do you get that information?

The Witness: The cost of this building, his investment in that portion, is contained in questions No. 70—

Mr. Landrum: Exhibit No. 70, the questions and answers in this case.

The Witness: And the information concerning the cash investment is contained in Exhibit 223.

The Court: And where did you get the information from which you made 223?

The Witness: That is from the books and records of the B & S Company.

Q. (By Mr. Lord) And are you now reading from a work paper wherein you correlated the information in 223 plus the information on the questions and answers, Government's Exhibit 70?

A. Yes, I am trying to correlate them.

Q. And to arrive at the total investment of this man in that company?

A. That is correct.

The Court: The jurors may retire for the luncheon hour Court will recess until 2 o'clock, Mr. Bailiff.

Q. Mr. Kleven, I believe you were making an explanation of the amounts which you found as investments in the B & S Company. Now, do you want to state and give us that explanation?

A. Yes, I will. The Government's Exhibit No. 223 of itself shows 315 shares of stock outstanding and a capital stock of $31,500.00. It also shows 105 shares in the name of Thomas W. Banks, which indicates his investment to be $10,500.00. However, with the use of Government's Exhibit Nos. 70 and 71, I have interpreted the investment to be $8,849.33 at the end of 1944, '45, '46, and '47.

Q. Have you credited him with any investment as of the end of 1943?

A. I have credited him with $3,400.00 as his portion of the cost of the Kruze Building.

Q. Mr. Kleven, in the course of your work on this matter, have you had occasion to examine the records which were made available to you concerning the 10th Street Realty Company?

A. Yes, I have.

Q. Will you tell us approximately the date on which you examined these records?

A. I saw those records in the spring of 1951.

Q. Where did you first go to find them?

A. I believe I saw those records in Mr. Weinstock's office when I was examining the retained copies of the partnership, 10th Street Realty Company.

Q. Well, now, were they with the retained copies?

A. Yes, they were with the retained copies and Mr. Weinstock and Mr. Brancheau said that this report which had been prepared by Mr. Brancheau—the information on this report was used in preparing the returns.

Q. Is that return in evidence here today?

A. Yes, it is.

Q. Well, now the—you stated that you looked at a report that was not in the form of regular bookkeeping entries in the set of books, was it?

A. No, it was a typewritten report.

Q. Did you hear Mr. Brancheau refer to that book here on the stand?

A. Yes, I did.

Q. Based upon the records which you saw there and based upon the income tax returns that you saw at that same time and which are now in evidence here in this case, can you tell me what is the investment of Thomas W. or Rita Banks in the 10th Street Realty Company?

Mr. Graff: Just a moment. The first part of the question said based upon reports that he saw there. I wonder if the question could be a little bit more explicit so we know just what records are referred to, Your Honor.

Mr. Lord: Would you read the question, Mr. Reporter?

(The question was read.)

Mr. Graff: I think, Your Honor, before he answers that question, I would like to have specified the records that are referred to in the questions and the records "he saw there."

Mr. Landrum: He has already stated that, Your Honor.

The Court: Well, Mr. Reporter, read it again.

(The question was re-read.)

The Court: The uncertain portion of that question is based on the records that this witness saw there. That is what makes it indefinite and uncertain. Of course it is proper to make your question definite and certain so there will be no question as to what the answer means.

Mr. Landrum: I believe this witness has testified, if the Court please, that in the office of Mr. Weinstock, who was the accountant for this company, he saw these records. I think that is his testimony.

The Court: What records do you mean?

The Witness: This was an operating report prepared by Mr. Brancheau,—

The Court: (Interposing) Of the 10th Street Realty?

The Witness: Of the 10th Street Realty Company, and the retained copies of their tax returns for the 10th Street Realty Company.

The Court: Now, what is Mr. Brancheau's connection with the company?

The Witness: He was operating manager and he—

The Court: (Interposing) Of the company?

The Witness: Of this building, and he made out an annual report which he gave to Mr. Weinstock, who used that in the preparation of his tax returns for the department.

The Court: You may answer the question.

A. According to the—

Mr. Graff: (Interposing) Pardon me a moment, Mr. Kleven. May I, Your Honor, have an objection to any and all further testimony by this witness insofar as his answer may pertain to Rita Banks on the ground that it is irrelevant and immaterial.

The Court: I think that is thoroughly understood.

A. Using the records of the partnership returns and Mr. Brancheau's report, the investment as of December 31, 1946, was $9,925.00, and as of December 31, 1947, was $14,603.00. This includes both capital and loans.

Q. (By Mr. Lord) Mr. Kleven, have you been in this court room during all the trial of this case?

A. Yes, I have.

Q. Have you heard all of the oral testimony as to the fact?

A. Yes, I have.

Q. And have you had occasion to examine the various exhibits introduced into evidence in this case?

A. Yes.

Q. From the exhibits in this case and from the oral testimony adduced here in this court room as to facts, are you able to make an analysis and a summary under the net worth method to show the income of this defendant from the years 1936, 1941, '42, '43, '44, '45, '46, and '47?

A. Yes.

Q. Have you reduced such a summary to chart form.

A. Yes, we have.

(Government's Exhibit 224, consisting of six parts, marked for identification.)

Q. Mr. Kleven, showing you Government's Exhibit 224, can you tell me what that is?

A. That is a typewritten copy of the figures that I prepared of the net worth summary.

Q. Was that prepared more or less under your general supervision?

A. Yes, it was.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 224.

(Exhibit handed to Mr. Graff.)

Mr. Graff: If the Court please, Government's Exhibit 224 consisits of six pages of many, many figures. Has the Court seen it at all?

The Court: Not at all.

Mr. Lord: I will supply one to the Court.

Mr. Graff: I think the Court should have one. It will take some time to examine this exhibit, Your Honor.

The Court: Is there further examination of this witness on direct?

Mr. Landrum: If Your Honor please, yes. Your Honor, of course, I am sure, realizes what the witness has presented is a summary and an analysis of the testimony in this case going to show the net worth of this defendant, which I believe has been admitted in a number of cases, even one that Your Honor, if I may be forgiven, tried,—the Gleckman case, and if Your Honor please, necessarily if they want time to go over that exhibit, they must necessarily go over all of the testimony in this lawsuit, because that is what is contained in it. I have no doubt at all but what it is a summary and the Courts have repeatedly held that such a summary is admissible as an aid to the Court and to the jury.

Mr. Graff: I am just asking Your Honor for some time to examine it, is all.

The Court: Well—

Mr. Landrum: (Continuing) Now, if I might say this, if Your Honor please, following this exhibit we have an enlargement of it which is not in the court room. It will take us probably 10 or 15 minutes to bring it in here. We propose to follow this exhibit with the enlargement, and then go over that enlargement in detail for the benefit of the Court and jury.

So, if Your Honor was going to give them ten or fifteen minutes to look at it, we will go get the other exhibit and bring it in the court room, if I might be permitted to suggest that.

The Court: Will that be sufficient time?

Mr. Graff: I hardly feel so, Your Honor, and I think I can demonstrate that if I may be permitted to ask this witness a question or two.

Mr. Lord: As to foundation?

Mr. Graff: Yes, with reference to proposed Exhibit 214.

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The Court: Well, if you have some questions as to foundation, you may make that inquiry at this time.

Mr. Graff: Yes.

Q. (By Mr. Graff) Did you prepare Government's Exhibit 224, Mr. Kleven?

A. I prepared the figures that are used on that exhibit.

Q. I mean, of course, you did not do the mimeographing, but I mean, you prepared the report?

A. That is correct.

Q. And may I ask you when you prepared it?

A. That was last Friday night.

Q. You prepared it last Friday night? A. Yes, sir.

Q. And then you had it mimeographed? A. Yes, sir.

Q. Had you worked it up preparatory to that time?

A. Yes, I had. That was modified at that time.

Q. I see, but did you have it substantially completed last Friday night?

A. Yes.

Q. And then you made some modifications of it?

A. That is correct.

Q. Were the modifications that you made on Friday night, without going into them,—were they minor?

A. Of a minor character.

Q. Of a minor character. So that you had the exhibit all prepared with the exception of those minor corrections before the trial of this case?

A. That is correct.

Q. And how long before the trial of this case?

A. Well, the bulk of it, I would say, was May of last year.

Q. May of 1951? A. That is correct.

Q. And do you know about how long it took you to prepare it,—man hours, just roughly?

Mr. Landrum: Go ahead, tell him, if you know.

A. That is the result of all of our work in the investigation.

Mr. Graff: I think, Your Honor, it must be very apparent that ten or fifteen minutes is not quite enough to examine something that has apparently taken some time in its preparation.

The Court: Have you the enlargement of this exhibit ready at this time?

Mr. Landrum: We have. It is down in the United States Attorney's office. It is on an easel. Do you desire to proceed with the examination of this witness with reference to the enlargement of the exhibit—the enlargement, Your Honor, it will be much clearer. For the purpose of clarifying the situation, the enlargement is much better. It is impossible to do it with this small one.

Mr. Graff: I rather disagree with that conclusion. I assume that this witness will have no difficulty doing it from the mimeographed copy that he prepared. I do not suppose that the enlargement would serve any purpose as far as this witness is concerned.

The Court: Well, nothing except to place the data before the jury.

Mr. Landrum: That is right.

Mr. Graff: Well, the implication of counsel's statement was that this witness, it would be so much easier for him with the enlargement. I rather disagree with that.

Mr. Landrum: If the Court please, I want to make this thing easier for all of us and that enlargement will do it.

Mr. Graff: Well, may I say in that respect, Your Honor, that I am not always committed to doing things the easiest way. I want to do them the right way.

The Court: That is right.

Mr. Graff: And it occurs to me that until this exhibit is in evidence that it should not be exhibited to the jury and I suggest that at the present time no sufficient foundation has been laid for its reception into evidence. It occurs to me that there has been no foundation as yet laid for it, so we will object to it and its reception into evidence at this time on the ground that no sufficient foundation has been laid for it.

The Court: Let me ask you, Mr. Kleven, is the data forming the basis for Exhibit 224—is it in evidence in this case?

The Witness: It is in evidence in the form of Exhibits or testimony.

The Court: Either in these exhibits that have been received in evidence or oral testimony of witnesses?

The Witness: Yes.

The Court: In addition to that data or that evidence, you have made calculations, have you, yourself?

The Witness: Yes, I have.

The Court: And have inserted them in Exhibit 224?

The Witness: That is correct, sir. There are calculations that are necessary for depreciation, and so forth, that have been made and summaries of items in evidence.

The Court: Is this chart or enlargement different from Exhibit 224?

The Witness: It is exactly the same.

The Court: It is merely an enlargement, did I understand?

The Witness: That is right, it is an enlargement of this exhibit.

The Court: Now, gentlemen, such exhibits as 224, that has been referred to by this witness in his testimony and has been offered by counsel for the Government,—the attorneys for the defendant are entitled to some time to make a study of the exhibit and to make such objections as they may desire, but I think we should proceed with the trial of this case.

Now, I have not seen the exhibit that is to be brought in, as mentioned by counsel for the Government, but this witness has stated that it is exactly like Exhibit 224. I think it may be brought in and counsel may proceed with the examination of this witness. If it is found to be absolutely inaccurate or for any reason not admissible, it will be necessary to strike it from the record and instruct the jury that it is not competent evidence and that they must wholly disregard it in this case. However, if it is found to be competent and material, it will be received.

I know there has been controversy about whether such exhibits as this are admissible. I think in recent years, anyway, they have usually been received and the action of the trial court in such cases has been sustained by the Courts of Appeals and by the Supreme Court. So I think you may move in your proposed exhibit, the enlargement of Exhibit 224. In the meantime the Court will recess for ten minutes.

Mr. Hoffmann: May we say one thing at this time, Your Honor?

The Court: Yes.

Mr. Hoffmann: I trust the Court, prior to its statement now completed as part of the record, was mindful of this witness' testimony in response to the question of the District Attorney as to what the computations of this witness, as represented by 224, were based upon. The record, I am certain, Your Honor, will disclose the answer of the witness to have been that his computations, as now reduced to 224 and as

proposed to be reflected by the chart that the District Attorney refers to, were based upon, he said, "All of the Exhibits in this case, and" most important, Your Honor, "all of the testimony in this case"—which means up to the moment of his so speaking. He said that he was in the court room all of the time during the course of this trial; that he took into consideration all of the testimony adduced up to the time of his speaking, and then, upon a question put to him by Mr. Graff, it develops that the chart here referred to as Exhibit 224 was prepared last Friday night, May 23rd, and that, in the main, Your Honor, the witness' testimony went on to relate that it was prepared by him a long time prior to the commencement of the trial, but in effect as to some minor alterations, had only those changes as of the time of last Friday night.

Your Honor, the witness testified that he made the exhibit in 1951, and the Government's offer, simply and briefly, our point is, is based upon this witness' statement in response to the foundation questions that this exhibit reflects his understanding and acceptance and interpretation of all of the evidence in this case.

Mr. Landrum: May I say a word, Your Honor?

The Court: Yes.

Mr. Landrum: Counsel has misquoted just one little word. That little word was it was based upon the testimony as to "facts" in this case,—facts. Testimony as to facts is what the witness said.

Mr. Hoffmann: Your Honor, I shall be glad in behalf of the defendant to have the District Attorney in behalf of the Government state that is the basis of their offer as to foundation of this exhibit, because now it is completely obvious that they are asking this witness to interpret testimony and determine what part of the testimony constitutes a fact and what part is rejectable to him. It is, therefore, an invasion of the province of the jury.

Mr. Landrum: I do not care to argue it any more.

The Court: Well, it is unnecessary for the Court to rule at this time, I think. The exhibit may be brought in.

Mr. Lord: If Your Honor please, the enlargement of the exhibit mentioned as Government's Exhibit 224 is now in court and we ask that it be marked by the Clerk.

The Court: It may be marked as an exhibit in the case.

Mr. Hoffmann: I take it, the record may show, Your honor, that all we have stated applies to the proposed exhibit as well and with full force as it applies to 224.

The Court: That may be understood.

Mr. Lord: At this time, if the Court please, we offer Government's Exhibit 225 into evidence.

The Court: A ruling on the admission will be withheld for the time being.

Mr. Lord: May I examine the witness?

The Court: You may proceed. You may use the exhibit in the examination of this witness.

Mr. Lord: If the Court please, there is another sheet in the back of this exhibit which we are not offering in evidence at this time.

Mr. Graff: If the Court please, did I understand that this was an exact copy of 224?

Mr. Lord: That is my understanding, sir, that the witness has testified that the words and figures on there are an exact copy.

Mr. Graff: My understanding was that it was an exact copy of 224. Unless I have an erroneous copy, it is somewhat different from my copy.

Mr. Hoffmann: It is not at all similar to 224 as to the first page, Your Honor. I should not say that. It is not identical with the first page.

Mr. Landrum: It looks like it to me.

Mr. Lord: I note that the—

Mr. Hoffmann: (Interposing.) Just a moment, counsel.

The Court: I see no difference except the years up at the top.

Mr. Graff: My understanding was that it was identical. May I point out, Your Honor, that at least the copy which I have,—mine has 1936, 1937, 1938, 1940, 1941, 1942, 1943, 1944, 1945, 1946, and 1947. If I observe correctly, Exhibit 225 before me has not those years. It has 12-31-36, 12-31-41,—

The Court: You are correct about that.

Mr. Graff: Yes. Well, I mean, I may have labored under a misapprehension. My understanding was it was an exact copy except that it was an enlargement.

The Court: Well, the difference may be explained in the testimony.

Q. What general procedure did you follow in setting up this chart? Let us start with what you did with the figures which you have in the column under 1936.

Mr. Hoffmann: May, first, Your Honor, with respect to each of such questions as now propounded by the District Attorney to this witness, there be for record purposes and for cross-examination purposes, a determination of where from the figures that the witness refers to came to him?

The Court: (To Mr. Lord.) You may include that in your question.

Q. (By Mr. Lord.) I have not asked you for figures particularly, but you may tell, if you will, how you constructed this chart and what the chart means generally. We will go into figures later.

A. This chart, No. 225, consists of six pages. The first four sheets consist of assets, various classifications of assets and detailed listings of each type of assets are included in these first four sheets. The fifth sheet is a list of liabilities, and the sixth sheet is a computation of income based on the net worth method.

Q. Now, Mr. Kleven, is it correct to say that the lines as they run across, across horizontally, starting with line 1, represent a particular asset and the amount which his investment in that asset is worth as of each year?

A. As of the end of each year.

Q. Now, I note, Mr. Kleven, that there is a jump from the year 1936 to the year 1941, and before going into the figures, based upon the facts in this case as you have stated, and the evidence adduced here, and the exhibits, could you tell me why your chart jumps from 1936 to 1941 without having the intervening years in there?

Mr. Hoffmann: Just a moment, if the Court please. We object to the form of question, first, for the reason that it asks this witness to determine a fact from the evidence in this case. We submit the lack of foundation is demonstrated by the very question for it calls from this witness for an interpretation or characterization of someone else's testimony which is not, as we understand it, permitted to be done by anyone except the jury and, therefore, invades the province of the jury. We submit that when counsel asked this witness if he took into consideration for the purpose of any one figure on this chart facts, that counsel refers to facts as this witness understands facts to have been established by evidence. We cannot, Your Honor, concede or submit that it is this witness' prerogative to interpret testimony except what he desires as a fact, and reject what he pleases as not

established as a fact for the purpose of this or any other testimony.

The Court: Do you have the question in mind?

The Witness: Yes, I do.

The Court: You may answer it.

Mr. Hoffmann: Now, if the Court please, to save time, may that same objection—our position is outlined by that statement—run to any other testimony that this witness gives with respect to any figure on this chart?

The Court: That is agreeable to the Court.

Mr. Hoffmann: And the same objection, of course, we trust, may run on this witness' testimony with respect to 225 as runs to 224?

The Court: That is agreeable to the Court. (To the witness.) You may answer the question, Mr. Kleven.

A. The years 1937, '38, '39, and '40, are not included in this chart because sufficient evidence was not found to produce an accurate net worth for those year-ends.

Mr. Hoffmann: We submit that that go out as a conclusion.

The Court: The motion is denied.

Q. (By Mr. Lord.) Have you examined the Government's exhibits here as to income during that period '36 to '41?

A. Yes, I have examined the income statements from the tax returns prepared by the taxpayer for those years.

Q. Does the fact that you have entered the year 1941 here mean that you were able to arrive at this man's net worth as of that date?

A. Yes, it does.

Mr. Graff: Just a moment. If you will wait, please, until we have an opportunity of making an objection,—we

object to that question as being leading and suggestive and assuming facts not in evidence.

The Court: The objection is overruled.

Q. (By Mr. Lord.) Did you answer?

A. I said, "Yes, it does."

Q. Mr. Kleven, referring your attention to line 1 on the first page of Government's Exhibit 225,—can you tell me where you got the information in the exhibits with which you arrived at the figures set out there?

Mr. Landrum: Line 1, you are referring to?

The Witness: Yes, that was obtained from Exhibit No. 72.

Q. (By Mr. Lord.) Mr. Kleven, I show you Government's Exhibit No. 72. By looking at Government's Exhibit No. 72, can you tell me where you got the first figure of $63.39 listed under 12-31-41?

A. That was obtained from Government's Exhibit 72.

Q. And what does that show?

A. $63.39.

Q. Do the other figures on that line as set out correctly reflect the balance in the Marquette National Bank under the various dates which they appear from that exhibit?

Mr. Graff: Just a moment. I object that that question is leading, asking this witness for facts which apparently appear on Exhibits. I haven't any objection to the question if he directs this witness' attention to an exhibit and asks whether those figures appear on the exhibit.

The Court: Very well. I think that is a very good way to answer the question. Refer to the exhibit and answer what appears at various times during certain years on that exhibit.

Q. (By Mr. Lord.) Mr. Kleven, on Government's Exhibit 72, can you tell me what appears as the balance as of the 31st day of December, 1942?

A. $637.49.

Q. And as of the 31st day of December, 1943?

A. $1,373.90.

Q. And as of the 31st of December, 1944?

A. $899.45.

Q. And as of the 31st of December, 1945?

A. $2,461.65.

Q. And as of the 31st of December, 1946?

A. $2,177.79.

Q. And as of the 31st day of December, 1947?

A. $2,985.77.

Q. Mr. Kleven, directing your attention to line 2 of Government's Exhibit 225 and the first page thereof, can you tell me where you got the information with which you—

The Court: (Interposing). In the first place, I desire to interrupt. (To the witness.) What is line 1?

The Witness: That is the bank balance as of December 31st per the bank ledger card.

The Court: Whose bank balance?

The Witness: Mr. Banks' in the Marquette National Bank.

The Court: I think that clears up the situation. You may proceed.

Q. (By Mr. Lord.) What is line 2?

A. Line No. 2 is the bank ledger balance in the name of Rita Banks in the First National Bank of Minneapolis.

Q. And what Government exhibit contains the information with which you arrived at those figures?

A. Government's Exhibit 88.

Q. Handing you Government's Exhibit 88, I am going to ask you to give the various year-end balances for the years '36 through '47, with the exception of the years 1937, '38, '39, and '40.

A. The balance as of December 31, 1936, was $152.30; the balance as of December 31, 1941, $294.37; the balance as of December 31, 1942, $367.48; the balance as of December 31, 1943, $1,050.93; the balance as of December 31, 1944, $2,696.96; the balance as of December 31, 1945, $11,246.72; the balance as of December 31, 1946, $679.53; the balance as of December 31, 1947, $3,122.31.

Mr. Hoffmann: Your Honor, may the record show, by the witness' testimony, what account sheet he is reading from—not as to exhibit number but the name of the account.

Mr. Lord: I think that the account sheets are readily available to counsel on either side, Your Honor. They are not clearly identified. We will be here the rest of the week if he is going to identify each page. It is a running account.

Mr. Hoffmann: If the Court please, these have been received in evidence as Government's exhibits and they were identified, supposedly at that time, and they were received over our objection with the understanding that their relevancy and materiality would be demonstrated by the witness.

The Court: Mr. Kleven, can you identify the sheet from which you have been giving the data?

The Witness: It is the commercial deposit ledger of the First National Bank, Minneapolis, Minnesota. The customer's name is Rita Banks.

Mr. Hoffmann: We move that all the testimony given by the witness with respect to line 2 of Government's Exhibit 225 go out on the grounds heretofore stated.

The Court: The motion is overruled. You have a standing objection—

Mr. Hoffmann: All right. With that understanding, we will save a lot of time, Your Honor.

The Court: Very well.

Q. (By Mr. Lord.) Mr. Kleven, line 3 on Government's Exhibit 225, can you tell me what that is?

A. That represents two savings accounts in the First National Bank.

Q. And in whose name?

A. One of these was in the name of Mrs. Thomas W. Banks and the other in the name of Rita Banks.

Q. What exhibit numbers are they contained on?

A. Exhibit Nos. 89 and 90.

Q. Handing you Government's Exhibit 89 and Government's Exhibit 90, can you tell me how you arrived at the figures which you use here on line 3?

Mr. Graff: I would rather have the question, what exhibit he gets the figures from rather than how he arrives at them. I assume they come from some exhibit.

Mr. Lord: If the Court please, there are some of these figures that come from the exhibit and some from oral testimony.

The Court: You give the exhibit if you can do so, if it is readily available,—tell where you get that information.

The Witness: Yes, I will.

A. Exhibit No. 89 shows $1.03 as of December 31, 1936; Exhibit No. 90 shows a balance of $5.82, including interest from the prior year.

Q. (By Mr. Lord.) Have you added those numbers together to arrive at this figure then?

A. The total of those two figures is $6.85; the balance as of December 31, 1941, is $1.03 from Government's Exhibit 89 and $6.09 from Government's Exhibit 90, for a total of $7.12.

Q. You can explain the fact that you have entered $7.12 as being the balance through 1947?

A. The exhibit shows a reducing balance for the years commencing in 1944, but the oral testimony of the auditor from the First National Bank said that the taxpayer could claim the total amount at any time he chose, so that balance has been carried on straight through 1947.

Q. Now, with reference to line 4 of Government's Exhibit 225,—from what Government's exhibits did you obtain the information which you used in making that line?

A. That is Government's Exhibit 80.

Q. What is Government's Exhibit 80? What does that show?

A. That is the account of Thomas or Rita Banks in the Anoka Bank. The balance as of December 31, 1942, $492.98; the balance as of December 31, 1943, $347.88; the balance as of December 31, 1944, $1,004.38; the balance as of December 31, 1945, $1,365.20; the balance as of December 31, 1946, $2,558.57; the balance was of December 31, 1947, $1,788.88.

Q. Now, with reference to line 5 on Government's Exhibit 225, can you tell me from what exhibit you got the information which you set out on that line?

A. Exhibits No. 77 and 78.

Q. Now, will you explain what Government's Exhibits 77 and 78 are, and how you used them?

A. These are the savings accounts of Thomas W. Banks and Rita Banks.

Q. In what bank?

A. That is the Grand Marais State Bank, Grand Marais, Minnesota. The balance as of December 31, 1943, $175.00; balance as of December 31, 1944, $476.95; balance as of December 31, 1945, $781.75.

Q. I note that your chart contains a figure of $781.95. Which is correct?

A. The 75 cents.

Q. What is the balance as of the next year, then?

A. December 31, 1946, $1,114.25; balance as of December 31, 1947, $825.67.

Q. Where did you get the information,—from what exhibit did you get the information that you have used to enter the figures shown on line 6 of Government's Exhibit 225?

A. That is contained from Exhibit No. 82.

Q. Showing you Government's Exhibit 82, will you tell us why you put this figure on that line?

A. This is a check from Jamieson & Company, dated July 16, 1947, pay to the order of Rita L. Banks, for $2,488.74. On the reverse side this check was endorsed "Reta L. Banks", with no further endorsement. The bank cancellation or perforation, shows that this entered the bank, cleared the bank on February 7, 1948. Therefore it was held on hand as of December 31, 1947.

Q. Mr. Kleven, what have you done with reference to this line "Total cash", which appears under line 6 of Government's Exhibit 225, what does that represent?

A. That represents the addition of lines 1 through 6.

Q. And can you tell me what the total cash and Government bonds you arrived at in the name of this defendant for the years ending December 31, 1936, 1941, through '47?

A. The total cash was $159—

Mr. Graff: (Interposing) The question was, Mr. Kleven, cash and bonds.

Mr. Lord: I believe that may be right and I will amend the question.

Q. (By Mr. Lord.) The total which you have charged as cash for the year 1936, for the year 1941 through '47?

A. The total cash as of the end of 1936 was $159.15; December 31, 1941, $364.88; December 31, 1942, $1,505.07; December 31, 1943, $2,954.83; December 31, 1944, $5,084.86; December 31, 1945, $15,862.64; December 31, 1946, $6,537.26; December 31, 1947, $11,218.49.

Q. Now, Mr. Kleven, I direct your attention to that portion of Government's Exhibit 225 and the first page thereof under "U. S. Government Bonds", line 7,—can you tell me what exhibit you used to arrive at the figures which you have entered there?

A. Government's Exhibits 97 and 98.

Q. Are they both on line 7, Mr. Kleven?

A. There is one bond in Exhibit 98 and four bonds in Government's Exhibit 97.

Q. Again referring to line 7, can you tell me what you charged as being an asset as represented by his investment in bonds for the year ending December 31, 1941?

Mr. Graff: I object to that question on the ground that it is leading and it is suggestive. This witness is explaining the chart that he prepared. He is doing it from certain exhibits.

The Court: You may make an explanation of line 7.

A. That represents the summary of four series "E" bonds in Government's Exhibit 97, two $100.00 bonds, two $25.00 bonds, and one $500.00 bond at cost price; for a total of $562.50. This balance was the same for December 31, 1942, '43, '44 and '45. These bonds were redeemed in 1946.

Q. (By Mr. Lord.) Can you explain to me line No. 8 on Government's Exhibit 225? What exhibit number was that information taken from?

A. From Government's Exhibit No. 97 and 96. The balance as of December 31, 1942, consists of one $500.00 bond at a cost price of $375.00; the balance as of December 31, 1943, consists of nine $1,000.00 bonds, two $500.00 bonds, and two $25.00 bonds, at a cost price of $7,537.50.

Mr. Graff: May the record show, Your Honor, what exhibit the witness is now reading from?

Mr. Landrum: He has got the memorandum he prepared for his own use.

Mr. Graff: Just a moment.

Mr. Landrum: It is not any exhibit.

Mr. Graff: Just a moment. May the record show what exhibit the witness was reading from?

The Court: I think the witnes has stated Exhibits 97 and 98.

Mr. Graff: Well, I submit, Your Honor, he was not.

The Court: Very well. (To the witness.) What exhibit are you getting this information from?

The Witness: The information that I wrote down here and have summarized is from Government's Exhibits 96 and 98.

The Court: Very well. In whose name were these bonds?

The Witness: These bonds were issued in the name of Mrs. Rita L. Banks or Mr. Thomas W. Banks.

The Court: Some in each?

The Witness: Most of them jointly.

Mr. Graff: If the Court please, I would like to ask the witness a question, if I may, at this time with respect to what he was testifying from concerning the exhibits in his present testimony.

Mr. Lord: If the Court please, the question I asked the witness is from what exhibits did you obtain the information which you used in arriving at the figures shown on this chart. Now, the witness has the exhibits on his lap and whether or not he has a memorandum to help guide him to use and expedite this trial is immaterial.

Mr. Graff: Do you admit, counsel, then that he was using something else?

Mr. Lord: I haven't admitted anything.

Mr. Graff: Just a moment, please. Do you admit that he was using something else than the exhibits which are in evidence in answer to your question?

Mr. Lord: No.

Mr. Graff: May I ask the witness a question, Your Honor?

The Court: Yes.

Q. (By Mr. Graff.) Mr. Kleven, in answer to the preceding question were you using and reading from something which was not an exhibit in evidence in this case?

A. That is true.

Q. (By Mr. Lord) Mr. Kleven, was the analysis which you had in your hand along with the Government's Exhibit merely a computation made by examining the exhibit?

A. Yes, I need some form of a summary to total that.

Q. You mean that it would be difficult for you to add up those thousands of dollars in your head while you sit on the witness stand?

Mr. Graff: Just a moment, I think that is—

The Court: (Interposing.) You may disregard the last question of counsel. Is there anything further?

Mr. Lord: Yes, Your Honor.

The Court: You may proceed.

Q. (By Mr. Lord.) Where were you, Mr. Kleven, with reference to the numbers?

A. The total cost value of these "E" bonds as of December 31, 1943, is $7,537.50; the total cost value of these bonds as of December 31, 1944 was $19,162.50; the total cost value of these bonds as of December 31, 1945, was $23,662.50; the unredeemed bond has a cost value of $18.75 as of the end of 1946, and as of December 31, 1947, $18.75;

Q. And what exhibit is that shown in?

A. That is shown in Exhibit No. 96.

Q. Now, with reference to line No. 9, can you tell me what evidence you used in arriving at the figure which you have set out there?

A. That value as shown there as of December 31, 1936, of $200.00, is a United States Government Bonus Bond as admitted in the taxpayer's affidavit, Government's Exhibit 33. There are no redemption figures for that bond and that has not been set up in subsequent years.

Q. Would you read me that section of Government's Exhibit 33 wherein that Bonus Bond is mentioned?

A. "That I own a Government Bonus Bond in the amount of $200.00 which I understand are exempt from attachment for a Government indebtedness."

Q. Now, have you added the total of U. S. Government Bonds which you have mentioned with reference to this exhibit, which are in evidence?

A. Yes, I have.

Q. And what did you arrive at as being his investment in such bonds for the years shown on this chart?

A. The total of such bonds was $200.00 as of December 31, 1936; $562.50, at the end of December 31, 1941; $937.50, as of December 31, 1942; $8,100.00 as of December 31, 1943; $19,725.00 as of December 31, 1944; $24,225.00 as of December 31, 1945; $18.75 as of December 31, 1946; $18.75 as of December 31, 1947.

Q. Now, have you made what is here termed a "Grand Total" of his cash and United States Government Bonds for the years shown on this chart?

A. Yes, I have.

Q. And what is the total ending December 31, 1936?

A. $359.15 as of December 31, 1937; as of December 31, 1941, $927.38; as of December 31, 1942, $2,442.75; as of December 31, 1943, $11,054.83; as of December 31, 1944, $24,809.86; as of December 31, 1945, $40,087.64.

Q. Is that the line in which you stated that your number was in error?

A. Yes.

Q. Does that error appear in the total?

A. Yes, it would.

Q. You would actually be some off then, would you not?

A. 20 cents.

Q. Well, then, what should this number be here on the bottom of your grand total as of December 31, 1945?

A. $40,087.44. As of December 31, 1946, $6,556.01; December 31, 1947, $11,237.24.

Q. Mr. Kleven, directing your attention to the second page of Government's Exhibit 225, and line 10 thereof, — will you tell me from what Government's Exhibit, — what evidence you got the information which you used to make that one?

A. Exhibits No. 70 and 71.

Q. Will you read that portion of Government's Exhibits 70 or 71, which pertains to figures you have set out in line number 10?

A. This question pertains to bail bond given to Rubin Shetsky.

Mr. Landrum: Read it, please.

The Witness: Yes. "Question: How much of the above total, $20,400.00 was advanced by Thomas W. Banks?

"Answer: $5,000.00 given to A. M. Carey by T. Banks, still outstanding."

And the date of that —

Q. (By Mr. Lord, interposing.) Mr. Kleven, I believe that in order to establish the first date you should read more of that question, should you not?

A. All right.

"On August 8, 1945, A. M. Cary transmitted the following to the Walter Lemon Agency, St. Paul, Minnesota: Cashier's check No. 56312 for $5,000.00, cashier's check No. 36747 for $5,000.00, bank money order No. 65061 for $5,400.00, A. A. Berenson check No. 1611 for $5,000.00," for a total of $20,400.00.

Q. Now, will you finish reading —

A. Item No. 3 was purchased by A. M. Cary in the amount of $5,400.00, and that is the item that is referred to in the answer to question No. 3 in which was stated "$5,000.00 given to A. M. Cary by T. Banks still outstanding."

Q. Now, explain the figures on the chart, then, if you please.

A. Well, these checks were purchased in August, 1945. Therefore this $5,000.00 was outstanding as of December 31, 1945, December 31, 1946, and December 31, 1947.

Q. Now, can you explain the figures which you have entered under line 11 of Government's Exhibit 225?

A. Information for that is also contained in Government's Exhibits Nos. 70 and 71.

Q. Will you read the question and the answer, and if there is a statement preceding it which explains the question, I would like to have you read that, too.

A. Preface to question No. 4: "Check No. 5139 dated July 7, 1945, issued to Rita Banks by Blue Goose Resort, Inc. in the amount of $5,000.00 bears the endorsement of payee, A. H. G. Lee and California Bank, Los Angeles, California.

"Question: Does this transfer of funds represent a loan to Mrs. Banks' brother or does it represent an amount transferred to him for investment by Thomas W., Rita Banks, or both? Give purpose, total funds advanced, and dates and amounts of any repayments.

"Answer: Loan to Hardy Lee, still outstanding."

Q. Can you explain your figure there?

A. The $5,000.00 loan was outstanding as of December 31, 1945, December 31, 1946, December 31, 1947.

Q. Now, with reference to line 12 where it says, "M. J. O'Connor note," — can you explain that line?

A. Information on that note is contained in Government's Exhibits 208, 209, and 210. These exhibits show that

a $3,000.00 loan was made to Michael J. O'Connor on February 21, 1947, and that it was paid in full, January 17, 1951. The note has so stated. That indicates that the balance receivable as of December 31, 1947 was $3,000.00.

Q. There is some indication of a compromise in those exhibits, is there not?

A. Yes, there is.

Q. In the light of that, can you explain the figure of $3,000.00 which you have used here?

A. Well, that compromise was not paid until 1951.

Q. (By Mr. Lord.) Was that still an outstanding obligation as of December 31, '47 in that amount?

A. Yes, it was.

Q. Now, with reference to line 13 of Government's Exhibit 225, the Quality Drug Company, — can you explain that line?

A. Information for that line comes from Government's Exhibits 70 and 71.

Q. Will you read that part of those questions and answers and the prefaces thereto which is necesary to help the jury and the Court arrive at an understanding of why you set that line up as you did?

A. This is question No. 15, the preface: "It appears that during 1943 and 1944, Ferdinand Hollen operated after-hour off-sale liquor establishments at the Quality Pharmacy and Phoenix Drug Co. both in Minneapolis. He stated under oath on December 11, 1947, that he owed Harry Shepard $7,500.00. Since Thos. W. Banks and Harry Shepard each reported 25% of the profits from liquor sales made by Hollen at the above-named stores, it is possible that each have shares in this loan to Mr. Hollen."

Q. I can't hear you, Mr. Kleven. Would you read a little louder and more distinctly, please?

A. (Continuing.) "Question: How much did Mr. Banks advance, directly or indirectly, to Mr. Hollen?

"Answer: 50% Nov. 1st, 1944 $5,000.00
Jan. 1st, 1945 1,500.00
Apr. 1st, 1945 1,000.00." — for a total outstanding of $7,500.00, of which 50 per cent would be $3,750.00 as of December 31, 1945, December 31, 1946, and December 31, 1947.

Q. Now, with reference to line 14 of Government's Exhibit 223 —

A. That also comes from Government Exhibits Nos. 70 and 71.

Q. Would you read the pertinent portions of those exhibits?

A. This is question No. 26 (D): "Question: Does Thomas W. Banks have any loans outstanding to Thomas E. Ewing or Florence Ewing? State date and amount of advances?

"Answer: $10,000.00 about Sept. 30th, 1944." — which indicates that there was $10,000 outstanding as of December 31, 1944, and December 31, 1945, and December 31, 1946, and December 31, 1947.

Mr. Graff: Now, I would like to have the record show, Your Honor, that while the witness purported to read from Exhibit 70, the last portion of it for the years '45, '46, and '47 was not read from Exhibit 70 and is a conclusion of this witness. Now, I move that it go out as being a conclusion of the witness, the witness not having adduced any evidence or any exhibit to support his conclusions for the years '45, '46, and '47 on Exhibits 70 or 71.

The Court: (To the witness.) You may explain why you answered as you did, if you have any explanation.

The Witness: This question clearly indicates that this loan was outstanding as of all of those dates, if you will listen to the question —

Mr. Graff: Just read the question and answer.

The Witness: That is what I mean. Listen to it. It says, "Does Thomas W. Banks have any loans outstanding to Thomas E. Ewing or Florence Ewing? State date and amount of advances?"

Mr. Graff: Now will you read the answer, please?

The Witness: "Answer: $10,000.00 about Sept. 30th, 1944."

Mr. Graff: All right. I renew my motion, Your Honor.

Mr. Landrum: Well, of course, the questions and answers weren't given until 1950 and he said it was outstanding then.

Mr. Lord: It is in the present tense — "Does Thomas W. Banks have any loans outstanding? — Give date and amount." He said $10,000.00 in '44. That is a legitimate conclusion.

The Court: (To the witness.) Did you find any data showing that the loans had been paid or cancelled, or anything done with them?

The Witness: No, sir.

Mr. Graff: May I submit it to the Court, Your Honor?

The Court: Yes.

(Government's Exhibit 70 handed to the Court.)

The Court: Is there an unanswered question or a motion pending, Mr. Reporter?

(The motion was read.)

The Court: The motion is overruled. You may proceed.

Q. (By Mr. Lord) Mr. Kleven, did you finish your explanation of the line?

A. Yes, I did.

Q. Now then, directing your attention to line 15 of Government's Exhibit 225, can you tell me how you arrived at that figure?

A. That comes from Government Exhibits Nos. 103 and 104.

Q. Will you explain that figure, please?

A. This is an account in the accounts receivable ledger in the name "Thomas Banks' — residence." November 19th, there is an entry for a credit of $2,000.00. This credit remains as a balance as of December 31, 1947.

Q. Now, with reference to line 16 of Government's Exhibit 225, can you explain that line?

A. Mr. Wickers orally testified that he borrowed $2,500.00 from Mrs. Rita Banks in 1946 and that he repaid it in 1947. He also testified that he borrowed $4,500.00 from Thomas Banks in 1947 and repaid it in 1948.

Q. Are there any documents in evidence here to substantiate his testimony?

A. There are Exhibits 108, 109, and 112, which Mr. Wickers testified were funds that he used in repayments of these loans.

Q. Now with reference to line No. 17, can you explain that?

A. Mr. Schuettler orally testified that he borrowed $10,000.00 from Mr. Banks in 1944 and repaid it in 1945, which would leave a balance of $10,000.00 as of December 31, 1944.

Q. Now with reference to line 18 on Government's Exhibit 225, can you explain that, please?

A. Information for this would come from Government's Exhibits 77, 78, and 79.

(Exhibits handed to the witness.)

Q. And what figures did you arrive at there and what do they represent?

A. Government's Exhibit No. 79 shows that Mr. Halvorson received a $1,400.00 loan from Tom Banks in September of 1943. It also states that it would be repaid in payments

of $25.00 per month. Mr. Halvorson orally testified that he made payments of $25.00 per month and that they were deposited in the Grand Marais State Bank account. In 1943 there were $75.00 deposited in this account, which reduced the $1,400.00 loan to $1,325.00. In 1944 there were twelve deposits of $25.00 for a total of $300.00, which, subtracted from the $1,325.00, leaves a balance of $1,025.00 as of December 31, 1944. In 1945 there were twelve deposits of $25.00 for a total of $300.00, which reduced this loan to $725.00 as of December 31, 1945.

In 1946 there were a couple of $50.00 deposits, one $75.00 deposit, and a number of $25.00 deposits, which totaled $325.00, which reduced the loan to $400.00. In 1947 there were two $25.00 deposits and one $50.00 deposit and one $100.00 deposit, which reduced the loan to $200.00.

Q. Line 19, can you explain that?

A. Information for line 19 comes from Government Exhibit No. 222. This exhibit is T. W. Banks' account in Brady's Bar, Inc., — account in the general ledger. It has a debit balance of $6,934.42, which indicates that Mr. Banks owed the corporation that amount as of December 31, 1941, and that is carried as a red figure up there. As of December 31, 1942, the corporation carried a debit balance of $7,434.42, which indicates that Mr. Banks owed that money to the corporation, and it is set up as a red figure on that chart.

As of December 31, 1943, the corporation shows a credit balance of $9,240.10, which indicates that the corporation owed Mr. Banks that money, and which is set up as a black figure as a receivable.

Q. Now, line 20, Pearson's News Service.

A. Information for this line is contained in Government's 197, 198, and 200, and in a stipulation as to these balances.

Mr. Graff: I supposed the stipulation went only to the foundation.

Q. (By Mr. Lord.) The books that are in evidence shows those balances, do they not, and the other set of pages

that were included as a part of those books? Is that what you meant by stipulation?

(Document handed to the witness.)

Q. If there are other exhibits, you feel free to ask for them, Mr. Kleven.

A. Exhibit No. 200 shows a negative balance as of December 31, 1941 in the amount of $998.15. It also shows as of December 31, 1942 a negative balance of $438.00. It shows a positive balance of $1,610.00 as of December 31, 1943. It shows a positive balance of $410.00 as of December 31, 1944. It shows no balance for the end of 1945. It shows no balance at the end of 1946. It shows a positive balance—Exhibit No. 197-A shows a positive balance of $200.00 on December 31, 1947.

Q. Now, with reference to line 21, can you explain that?

A. Those figures were obtained from Government's Exhibits Nos. 152, 153, and the oral testimony read into the record by George McKusick.

(Exhibit handed to the witness.)

A. (Continuing.) It consists of a total of three accounts in that book.

Q. And which book do you refer to?

A. The general ledger of the Blue Goose, Rita L. Banks, Notes Payable — Rita Banks, and Officers' advances; the figures read into the record by Mr. McKusick. On December 31, 1942, negative balance, $2,420.00; December 31, 1943, positive balance, $10,469.45; December 31, 1944, positive balance, $16,514.82; December 31, 1945, positive balance, $9,477.02; December 31, 1946, negative balance, $1,488.13; December 31, 1947, a positive balance of $511.87.

Q. Now, with reference to line 22, McCarthy's Cafe, Mr. Kleven.

A. That information comes from Government Exhibit No. 159, which is explained by a transcript of Mr. McKusick's, Government Exhibit No. 221.

(Exhibit handed to the witness.)

A. (Continuing.) Government Exhibit No. 221 shows a balance as of December 31, 1944 or $3,500.00; as of December 31, 1946, a balance of $13,500.00; and as of December 31, 1947, of $38,500.00, of which McKusick said $12,500 was Mr. Shepard's, leaving a balance of $26,000.00 as of December 31, 1947.

Q. Now, with reference to line 23, the Flour City Body Corporation, will you explain that line?

A. Information on that line is contained in Government's Exhibits 148 and 149.

(Exhibits handed to the witness.)

A. (Continuing.) Government Exhibit 149-D, notes payable, Flour City Body books, — an entry dated August 31, 1944, "T.W." and "A.M." — $10,000.00; August 31st, "T.W." and "A.M.," $4,000.00; August 31, 1944, "T.W." and "A.M.," $9,000.00, leaving a balance of $5,000.00, which is divided equally between Mr. Banks and Mr. Cary, leaving a balance of $2,500.00 as of December 31, 1944.

Mr. Lord: Counsel, I suppose you can appreciate it is hard to add these figures with someone looking over your shoulder. You will have a chance on cross-examination. He will have a chance on cross-examination, I believe, to question his figures, will he not, Your Honor?

The Court: Have you the exhibit, counsel?

Mr. Graff: No, I don't have the exhibit. I just wanted to make sure whether the witness was reading from the book or whether he was reading from his notes. I find he is reading from his notes.

Q. (By Mr. Lord.) Mr. Kleven, from what were you reading as counsel stood there?

A. I read those figures from the books.

Mr. Graff: Do you have your notes there, Mr. Kleven?

The Witness: I have my notes here.

Q. (By Mr. Lord.) What are you using your notes for?

A. For reference.

Q. To guide you through this? A. Yes.

The Court: The data you gave came from the books and records of these various concerns?

The Witness: The entries I read came from the books. My interpretation of the 50 per cent is my interpretation of the "T.W." and "A.M."

The Court: That is for each of these parties—the share of each of the parties?

The Witness: Yes.

Mr. Hoffmann: If the Court please, we ask that that testimony go out because as the foundation for this witness' testimony with respect to 224 and 225, it was by the witness stated that the charts were prepared by him, based upon the exhibits, and the testimony, and now it appears that another element has entered into his testimony and determination.

The Court: The motion to strike is overruled.

Q. (By Mr. Lord.) Mr. Kleven, have you then arrived at the numbers and given them to us here which you put on this exhibit? Were you giving the numbers? I wasn't watching the exhibit.

A. What is that, counsel?

Q. I say, were you, when Mr. Graff and I were both standing here beside you, giving us the numbers shown on that exhibit, or are you giving other numbers with which you arrived at it?

A. I read other numbers.

Q. I think you have stated that you have used the number shown in those books to arrive at the number shown on the chart, haven't you?

A. That is correct.

Q. Then I believe if you will give us the numbers on the chart that that will suffice and counsel can cross-examine

you as to what particular numbers you have used or didn't use.

A. Balances found from the excerpts from this account in these books showed a balance as of December 31, 1945 of $5,000.00 to a credit of Mr. Banks, and as of December 31, 1946, $2,750.00, and as of December 31, 1947, $2,750.00.

Q. Now, will you explain line 25, Mr. Kleven?

A. Line No. 25 is taken from Government's Exhibit 215 and the testimony of Mr. Weinstock. This check, No. 109, dated October 31, 1947, to Len Welsh in the amount of $5,000.00 was explained by Mr. Weinstock not to have been paid so far as he knew by the end of 1947, and therefore it has been set as an asset as of Decembr 31, 1947, in the amount of $5,000.00.

Q. Now, have you totalled the various receivables with which you have charged the defendant here on this chart?

A. Yes, I have.

Q. And will you tell me the year-ending totals, if you please?

A. As of December 31, 1941, there is a negative balance of $7,932.57; as of December 31, 1942, there is a negative balance of $10,292.42; as of December 31, 1943, a receivable balance of $22,644.55; as of December 31, 1944, there is a balance, total receivables, of $46,449.82; as of December 31, 1945, there is a total receivables of $42,452.02; as of December 31, 1946, there is a total receivables of $41,411.87; and as of December 31, 1947, there are total receivables of $67,911.87.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 28, 1952. Appearances are as has been heretofore noted.

(The following proceedings were had in the Court's Chambers:)

Mr. Graff: May the record show that this is out of the hearing of the jury, Your Honor?

The Court: Very well.

Mr. Graff: At this time we move to strike from Exhibit 224 on the last page thereof all the items reading from the bottom as follows: "Unreported Income, Net Income per return, and Corrected Net Income," on the ground and for the reason that the characterization in Exhibit 224 of these items invades the province of the jury in finding as a fact that there was certain unreported income in each one of those years.

Now, with particular reference to the years other than the years involved in the Indictment, that is the years '45, '46, '47, we further object to those figures being on Exhibit 224—by those figures, I mean "Correct Net Income, Net Income per return, and Unreported Income,"—for the reason and on the ground that the figures as stated therein are purely the conclusions of the individual who prepared this, and would serve no purpose other than to prejudice and create passion and feeling on the part of this jury.

With respect to the so-called item labeled "Unreported Income," for the years '45, '46 and '47, that is one of the very things that the jury is to determine and they propose, as we view it, by this Exhibit to take from the jury that right and thereby the province of the jury is invaded with respect to fact matters. Of course, the same objection goes to Exhibit 225, and we respectfully move that those portions be eliminated from Exhibit 224 and Exhibit 225.

The Court: Is that agreeable to counsel for the Government?

Mr. Landrum: Mr. Lord will answer it and then, if the Court please, if I might be permitted to say a word after he has concluded. I would like to step out and get my brief bag if I might while he is talking, because I think I have got a couple of citations in there, and I do not know whether Mr. Lord has them or not.

Mr. Lord: If the Court please, the witness who has prepared this chart has testified, and I believe, has laid sufficient foundation for his qualification as an expert witness. He is a certified public accountant, and has had six years of investigation of income tax fraud cases, together with other education and experience. Now, necessarily someone must form a conclusion to help guide this jury and the expert witness who has drawn that chart has assimilated the evidence and has shown as an expert his interpretation of that testimony and it has resulted in the figures which are shown on that chart. It is submitted that the complexities of the case are such as require interpretation by an expert in order to aid the jury in assimilating the evidence that has been presented.

Now, as to the years prior to 1945, '46, and '47, the cases hold that even though they might prove,—even though in the course of proving the offenses which we here charge, it might be necessary to prove other offenses which are the offenses which would be shown by the large amounts of unreported income and the small amount of reported income in the years '42, '43 and '44. They go to the question of intent and wilfulness and the cases hold that it is permissible to prove other crimes even if it is only for the purpose of proving intent and wilfulness in the crimes which we are charging the defendant with here. And there is another reason for showing the large amounts of unreported income in the years previous to the prosecution years. Those reasons are inherent in the use of the net worth system, where we attempt insofar as possible to show what the man's net worth was and what his income was every year from the starting point up until the period for which he has been indicted and it is submitted, although I do not have the cases at my fingertip, that such charts have been admitted in many other cases when such previous conduct as to unreported income has been admitted in evidence in tax cases of this type.

Mr. Landrum: If the Court please, I did not hear the first part of Mr. Lord's statement, but I desire to say to Your Honor that it is my opinion that the first proposition announced by Counsel is conclusively against him in the United States vs. Miller, a case in the Second Circuit, 61 Fed. 2nd, at 947. The second is a case which holds the same thing, namely, that the prosecution's accountants were allowed to present calculations, and that is exactly what was held in the Miller case, and it was also held in a case decided by Your Honor—not quite as clear as in the Miller case—but in the Gleckman case, which is reported in 80 Fed. 2nd, at 394, the same procedure was followed and the calculations were permitted in evidence. With relation to the second question, that is, setting up the other years, that has been decided many times,—there are many, many, cases, if Your Honor please, holding that it is entirely proper to set up the situation as it existed through the period, even though in setting it up there were other offenses,—not for the purpose of showing those offenses, but for the purpose of showing the general situation.

I desire to say to Your Honor that insofar as setting up those other years is concerned, I desire to say that there just is not any question about it under the law. I tried to find those particular cases, but it has been done many times, and I find no case that holds that that is not proper.

Mr. Graff: If the Court please, I am not familiar with the Miller case but I have read the Gleckman case and that is essentially, as I recall it, a bank deposits case which I think was tried the second time before Your Honor.

Now, I remember nothing in the Gleckman case that authorizes an expert witness to invade the province of the jury. This other rule that both counsel talked about that something is not objectionable because it happens to prove other crimes is not the situation that we have here. The situation that I think they are getting to is this: If, for

example, that you are proving, if you are trying an individual for, shall we say, murder, and as a part of the murder charge you prove that the individual robbed somebody, and the fact that you might happen to prove him guilty of robbery is not objectionable because it is part of the circumstances going to the proof of murder. There is nothing in that situation, Your Honor, and there is nothing in the so-called net worth idea that permits you or anybody to come up and say, "All right, it is my conclusion that in 1941 this man had an unreported income of $22,604.96."

That is an invasion of the province of the jury. That is a conclusion of this witness. That is for the jury to determine.

Mr. Landrum: Now, the cases, if Your Honor please, on that first question are United States vs. Chapman.

Mr. Kyle: First point, Mr. Landrum?

Mr. Landrum: United States vs. Chapman, 168 Fed. 2nd, 997; United States vs. Schuerman, 174 Fed. 2nd, at 397; United States vs. Potson, 171 Fed. 2nd at 495; and the Gleckman case, which I have heretofore cited, 80 Fed. 2nd, at 394.

Mr. Lord: I have even more and some quotations from the cases if Your Honor would care to hear them.

The Court: No, I am familiar with most of these cases. I know what they hold—I think I do.

Mr. Hoffmann: May I add just one thing, Your Honor?

The Court: Yes.

Mr. Hoffmann: With reference to the last three figures on the last sheet of the proposed Exhibits 224 and 225, to-wit, Unreported Income, 1945, $23,520.00; Unreported Income, $9.698.98, 1946; Unreported Income, 1947, $20,843.78, —we submit that it is so flagrantly obvious that those figures represent a characterization of the testimony, a conclusion drawn from the testimony, a conclusion, if you

please, sir, established by Mr. Kleven's testimony drawn from something that he got outside of the evidence and outside of the exhibits, and is a pretended determination of the very crux, and an invasion of the province of the jury to that extent, in this case.

The Court: Such evidence as this has been admitted in many cases in the last several years,—I mean, tax evasion cases,—very similar evidence, very similar statements. The same objection was made that is now made in this case, that is, that the exhibits showed conclusions and in many instances were inaccurate, invaded the province of the jury, but I do not know of any case that has been reversed for those reasons. Now, this witness is placed on the witness stand and Exhibits 224 and 225 are being used to summarize the evidence that is supposed to be in these exhibits. I am not sure it is all in the exhibits, but this witness seems to think so and I think if it is not in the evidence, counsel for the defendant will point out wherein the record is defective in any respect and show to the contrary.

This jury, however competent it may be as a jury, is not able to make the calculations that it is necessary to ascertain from the charts in this case. It takes an expert to do it, on either side, and that is the reason why courts generally are in favor of having somebody who knows something about bookkeeping and accountancy appear and explain these various things to a jury. Now, you may call it invading the province of the jury if you want to, but the jury needs the assistance of an accountant to tell them what is in a complicated lot of books—books of many concerns—because it is impossible for them to get the facts without that sort of assistance. So the motion is overruled.

Mr. Graff: Now, if the Court please, in order that we may not interrupt any more than is necessary, may we then have an objection running to all of Mr. Kleven's testimony pertaining to Exhibits 224 and 225 on the grounds that have

heretofore been stated to the Court, and on the further ground that if he is testifying as an expert, that there has not been sufficient foundation laid for him to express an opinion.

The Court: Very well. I think you are entitled to that objection.

(Thereupon the following proceedings were had in open court:)

The Court: You may proceed.

Whereupon, GERALD O. KLEVEN, resumed the stand and testified as follows:

Direct Examination (Continued)

By Mr. Lord:

Q. Mr. Kleven, directing your attention to the third page of Government's Exhibit 225 and line 27 thereon, would you explain that line, please?

A. That represents stock in Merchants Distilling Corporation and that was found in Government's Exhibits 11, 83 and 87,—the balance on hand of that stock as of December 31, 1946, $9,380.91.

Q. Now, would you in as short a time as possible explain to us just how you arrived at that figure?

A. There was a purchase dated May 14, '46, of 300 shares in Merchants Distilling, $4,820.19, and the subsequent purchase, June 3, 1946 for $960.00.

Q. And what exhibits are they shown in?

A. That is Exhibit 87.

Q. Is that the record of Jamieson & Company?

A. That is the record of Jamieson & Company, account of Mrs. Rita L. Banks, and Government's Exhibit 83 shows the sale of this stock on July 11, 1947. Therefore, it was on hand as of December 31, 1946.

Q. You made reference to Government's Exhibit 11. That appears to be the income tax return of T. W. Banks for the year 1947. Will you tell me where these stocks appear on that income tax return, if at all?

A. Those stocks are reported as "sold" in Mr. Banks' return for 1947.

Q. Now, with reference to Line No. 28, Mr. Kleven, will you tell me where you got those figures?

A. That came from Government's Exhibit 85.

Q. What is Government's Exhibit 85?

A. That is the stock brokerage ledger account from Jamieson & Company in the name of Thomas W. Banks and Mrs. Rita Banks. It shows the purchase of 400 shares of Gillette Safety Razor Company stock in the amount of $14,349.04, and it shows a cash receipt on January 5th of $1,075.49. January 6th is the settlement date for the purchase of this stock, but December 31, 1947, was the trading day and we have subtracted this cash payment from the total cost of the stock and which is the actual proceeds from the sale of Northwest Airlines stock on the same date of $13,273.55.

Mr. Graff: Just a moment. I understand now that you are relating this from Exhibit 85?

The Witness: Yes.

A. (Continuing) The balance from the proceeds of the investment of this stock as of January 31, 1947, $13,273.55.

Q. (By Mr. Lord) Mr. Kleven, will you explain line No. 29?

A. That is stock in the Northwest Airlines, Incorporated, and the information on this is obtained from Government's Exhibits 116, 117, 84, 85 and 11. The total investment of this stock as of December 31, 1945, is $22,019.29. The total amount of this investment as of December 31, 1946, is $28,957.29.

Q. Mr. Kleven, will you explain line No. 30?

A. The information for that stock was obtained from Government's Exhibit No. 10 and Government's Exhibit No. 33, and the balance of this stock as of December 31, 1941, was $750.00; December 31, 1942, $750.00; December 31, 1943, $750.00; balance December 31, 1944, $750.00; December 31, 1945, $750.00.

Q. What accounts for the fact that you do not carry a balance here then?

A. That was sold in 1936.

Q. Now, will you explain line No. 31, if you please?

A. Line No. 31, that is Insull Utilities bonds. The information for that was obtained in Exhibit 33, which indicates a zero—as worthless. Actually that stock had a cost basis of $3497.40.

Q. I note that you do not carry that stock in 1941. Can you explain the reason for that?

A. That was sold in 1939 as shown in Government's Exhibit 33.

Q. Now, can you explain line 32?

A. That also came from Government's Exhibit 33 which gave this a market value of $420.00. From other information that was shown to have a cost of $2819.53 as of December 31, 1936, in 1941, '42, '43, '44, '45, '46 and '47.

Q. Now, Mr. Kleven, will you explain line No. 33?

A. That is Banks and Shepard partnership. Information on that is contained in Government's Exhibits 218, 219, 24, 25, 26 and 27. The balance as of December 31, 1941, is $4,679.77; balance as of December 31, 1942, $6,796.96; balance as of December 31, 1943, $8,677.83; December 31, 1944, $7,884.56; December 31, 1945, $9,258.95; December 31, 1946, $8,219.03; and December 31, 1947, $9,038.14.

Q. Can you explain line 34, Mr. Kleven?

A. That is a partnership investment in Coin-A-Matic Amusement Company. The information on that is contained in Government's Exhibits 220 and 28 and 31.

The balance as of December 31, 1941, $5,192.26; December 31, 1942, $4,156.46; December 31, 1943, $6,140.77; December 31, 1944, $6,894.85; December 31, 1945, $8,058.53; December 31, 1946, $8,862.45; December 31, 1947, $7,505.72.

Q. Can you explain line 35, please?

Mr. Graff: May the record show, Your Honor, that the witness is testifying from notes that he has before him and is not using the exhibits to testify from.

Mr. Lord: We would abide by the Court's decision in that matter. If you would like us to go into each exhibit and pull the numbers out and take the time requisite to do that, we will do it. Otherwise—

The Court: (Interposing) Well, as there is an objection, I think that should be done.

Mr. Lord: We will be here a long time.

The Court: Very well.

Mr. Landrum: What line were you on, Mr. Lord?

Mr. Lord: 35.

Mr. Landrum: Please go ahead with it and then proceed with the exhibits.

Q. (By Mr. Lord) What exhibits were you using with reference to line 35?

Mr. Hoffmann: Your Honor, I think perhaps counsel, and through counsel the Court, misunderstood Mr. Graff's statement. As I understand this witness' testimony, what he purports to testify from now, he claims and states is his interpretation of these exhibits—

Mr. Landrum: (Interposing) No, he is testifying from a memorandum that he is using to refresh his recollection.

Mr. Lord: And he has stated the source of the information and the source of his figures are the exhibits which he

took. Now, he does not purport to be reading each exhibit, but will gladly do that if he thinks we should.

Mr. Hoffmann: If counsel will listen me out, I am sure the Court will appreciate what I am going to say. We understand the witness is now testifying from something that he prepared as he claims from the exhibits, is that correct?

Mr. Lord: He is testifying as to what he found in the exhibits. He has a memorandum in his hand to help to guide him through the exhibits, from which he drew that information.

Mr. Hoffmann: With that understanding, Your Honor, as to what he is testifying from,—Mr. Graff's purpose is that the record show what he is testifying from.

The Court: Well, he is using a memorandum that he has prepared to aid his memory of what he found in the exhibits. That is my understanding.

Mr. Landrum: That is correct.

Mr. Hoffmann: With that understanding, Your Honor, we simply wanted the record to show that fact, not that we seek to drive him back into these books and thereby prolong the trial.

The Court: Very well. That is agreeable. All right.

(To the witness) You may explain 35.

A. Line No. 35—

The Court: What are the exhibits on which you relied?

The Witness: Exhibits No. 160 and 221. The balance as of December 31, 1942 was $7,364.14; December 31, 1943, $11,864.14; December 31, 1944, $11,864.14; December 31, 1945, $11,864.14; December 31, 1946, $11,864.14; December 31, 1947, $11,864.14.

Q. (By Mr. Lord) Now, will you explain line 36?

A. That is the investment in the B & S Company, a corporation. The information on this asset comes from Exhibits No. 70 and 71, Exhibit No. 223, and my testimony of yesterday.

Mr. Hoffmann: Whose testimony of yesterday?

Mr. Landrum: Answer him.

The Witness: I testified on this company yesterday.

Mr. Landrum: Yes, I know; he asked you whose testimony.

The Witness: Pardon?

Mr. Landrum: He asked you to state whose testimony.

The Witness: Mr. Kleven's testimony.

Mr. Graff: In other words, your own testimony?

The Witness: Yes.

A. (Continuing) The balance as of December 31, 1943, is $3,400.00; as of December 31, 1944, $8,849.33; December 31, 1945, $8,849.33; December 31, 1946, $8,849.33; and December 31, 1945, $8,849.33.

Q. (By Mr. Lord) Now, will you explain line No. 37?

A. The information on this is the investment in capital stock in the Flour City Body Corporation, and the exhibits for this are Government's Exhibits No. 146, 147, and 33. The balance as of December 31, 1936 is $4,000.00; December 31, '41, '42, '43, '44, '45, '46 and '47, is $4,000.00.

Q. Now, would you explain Government's—correction, will you explain line 38?

A. This is capital stock investment in the Power Brake and Equipment Company, and Government's Exhibits 110 and 111. The balance as of December 31, 1946, $3,750.00, and December 31, 1947, $3,750.00.

Q. Now, will you explain line No. 39?

A. This is capital stock in investment in the Blue Goose Resort, Inc. Exhibits 150, 151, and the testimony of Mr. McKusick. The balance as of December 31, 1941, $7,125.00, and '42, '43, '44, '45, '46, and '47, as of December 31st of each year is $7,125.00.

Q. Would you explain line No. 40, Mr. Kleven?

A. That is stock and investment in the Wheel Service Company. The information for that is contained in Government's Exhibit No. 33—$4500.00 as of December 31, 1936.

Q. I note you do not carry that balance throughout. Can you explain that?

A. That was subsequently sold, as reported in Government's Exhibit No. 4.

Q. What is that, an income tax return? A. Yes.

Q. Now, would you explain line 41?

A. That is a partnership investment in the 10th Street Realty Company. Information obtained from Government's Exhibits No. 22, 100, 101, 102, and Mr. Kleven's testimony.

Mr. Graff: That is your own testimony?

The Witness: Right.

A. (Continuing) The balance as of December 31, 1946, $9,925.00 and December 31, 1947, $14,603.00.

Q. (By Mr. Lord) Will you explain line 42?

A. This is an investment in Casablanca, Incorporated. The information was contained in Government's Exhibit's No. 70, 71, and the testimony of Mr. Weinstock. Balance as of December 31, 1943, $7,800.00; as of December 31, 1944, $7,800.00; as of December 31, 1945, $7,800.00; as of December 31, 1946, $7,800.00; and as of December 31, 1947, $7,800.00.

Q. Will you explain line 43?

A. That is an investment in the Budweiser Tavern Building and the information on that is contained in question and answer statement, Government's Exhibits No. 70 and 71. Investment as of December 31, 1942, $3,071.50, and December 31, 1943, 1944, 1945, 1946, and 1947, is also $3,071.50.

Q. Will you explain line 44?

A. This is the investment account in the Pearson News Service. Information on this line is contained by stipulation in Government's Exhibits 196 and 199, and information is also contained in the tax return for 1947, Government's Exhibit No. 11. The balance as of December 31, 1941, $2,948.56; the balance as of December 31, 1942, $6,043.81; balance as of December 31, 1943, $2,951.67; balance as of December 31, 1944, $5,200.79; balance as of December 31, 1945, $11,408.01; December 31, 1946, $24,667.35; December 31, 1947, $5,765.24.

Q. Would you explain No. 45?

A. The information on this stock investment is contained in Government's Exhibit No. 214. The balance as of December 31, 1943, '44, '45, '46, and '47, was $1,775.00.

Q. Line No. 46?

A. This represents investment in the Koolaire, Inc. Information on this investment is contained in Government's Exhibits 182, 183, 173, 174, 175, 176 through 181, inclusive, 184-A and 184-B, and the testimony of Mr. Freedland. The balance as of December 31, 1947 is $18,200.00.

Q. Line 47.

A. This represents stock in National Plastics, and Banks, Cary, Shepard, and Bortz partnership, and the information on this is contained in Government's Exhibits 11, the 1947 tax return and the partnership return, Government's Exhibit 32, and the question and answer statement, Government's Exhibits 70 and 71. The balance as of December 31, 1944, $6,250.00; December 31, 1945, $8,125.00; and December 31, 1946, $8,125.00.

Q. Mr. Kleven, I neglected to ask you with reference to investments in marketable stocks and bonds, what you found as being the total investments in those stocks and bonds on the top portion of the third page of Government's Exhibit 225. Will you tell we what those totals were?

A. The totals of marketable stocks and bonds as of December 31, 1936, $6,316.93; December 31, 1941, $3,569.53; as of December 31, 1942, $3,563.53; December 31, 1943, $3,569.53; December 31, 1944, $3,569.53; December 31, 1945, $25,588.82; December 31, 1946, $41,157.73; and December 31, 1947, $16,093.08.

Q. Now, did you add the total investments in operating companies on page 3 of Government's Exhibit 225?

A. Yes, I did.

Q. And what were your totals?

The total investments in operating companies as of December 31, 1936, $8,500.00; December 31, 1941, $25,720.68; December 31, 1942, $40,332.87; December 31, 1943, $56,805.91; December 31, 1944, $70,715.17; December 31, 1945, $81,335.46; December 31, 1946, $108,033.80; December 31, 1947, $103,347.07.

Q. Now, have you added the total of investments in operating companies and investments in marketable stocks and bonds?

A. Yes, I have.

Q. Is that Government's Exhibit 225, the third page?

A. Yes.

Q. What are your figures?

A. Total Investments as of December 31, 1936, $14,816.93; December 31, 1941, $29,290.21; December 31, 1942, $43,902.40; December 31, 1943, $60,375.44; December 31, 1944, $74,284.70; December 31, 1945, $106,924.28; December 31, 1946, $149,191.53; December 31, 1947, $119,440.15.

Q. Now, turning to page 4 of Government's Exhibit 225, I note that you have real estate and other property, and the heading "Anoka Farms." Will you tell me what line 48 under the heading means?

A. That is the Inventory as shown per tax returns.

Q. Whose tax returns?

A. Mr. Banks' returns.

Q. What exhibit numbers are they?

A. Those are shown on Government's Exhibits 6, 7, 8, 9, 10 and 11. The Inventory as of December 31, 1941, is $745.00; December 31, 1942, $9,128.32; December 31, 1943, $12,692.10; December 31, 1944, $16,922.01; December 31, 1945, $16,284.25; December 31, 1946, $16,389.50; December 31, 1947, $20,907.01.

Q. Can you explain line No. 49, Mr. Kleven?

A. Those are the farm buildings and improvements on the main farm, and they are shown in Mr. Banks' income tax returns, Government's Exhibits 6, 7, 8, 9, 10 and 11. The balance as of December 31, 1941, $6,400.00; December 31, 1942, $17,176.36; December 31, 1943, $19,726.36; December 31, 1944, $21,497.27; the balance as of December 31, 1945, $22,750.19; the balance as of December 31, 1946, $24,840.75; December 31, 1947, $24,974.60.

Q. Can you explain line No. 50?

A. That is farm equipment on the main farm and those are also contained in the income tax returns, Government's Exhibits 6, 7, 8, 9, 10 and 11. The balance as of December 31, 1942, $9,259.75; December 31, 1943, $9,259.75; December 31, 1944, $11,715.71; December 31, 1945, $11,715.15; December 31, 1946, $16,848.12; December 31, 1947, $19,764.60.

Q. You have $18,000.00 on the chart here, Mr. Kleven. Which is correct?

A. $18,764.60.

Q. How do you account for that? Did you just make a mistake in reading that?

A. Yes.

Mr. Hoffmann: As a matter of fact, Mr. Witness, you just changed the entry on the thing you were reading from, did you not?

The Witness: I have made an error in addition—

Mr. Hoffmann: (Interposing.) The simple question is you just changed the thing you were reading from, did you not?

The Witness: I did.

Mr. Landrum: All right, go ahead.

The Witness: I changed the total. I did not change the entries that make up that total.

Q. (By Mr. Lord.) Did you now re-check your addition?

A. Yes.

Q. I believe we are on line 52, are we not?

A. 51.

Q. Will you explain that line?

A. That is the farm land on the main farm. The information for this line is contained in the testimony of Mr. Brancheau, Government's Exhibits 43, 37, 38, 42, 41, 40, 39, 202, and Government's Exhibit No. 5. The balance as of December 31, 1941, $3,830.35; December 31, 1942, $3,830.35; December 31, 1943, $5,130.35; December 31, 1944, $5,130.35; December 31, 1945, $5,130.35; December 31, 1946, $9,880.35; December 31, 1947, $9,880.35.

Q. Now, line 52, Mr. Kleven, will you explain that, please?

A. That line consists of the buildings on what is called in the tax return as Farm No. 2, — buildings and improvements. The information for that line is contained in Government's Exhibits 9, 10, and 11. The balance as of December 31, 1945, is $2,000.00; December 31, 1946, $2,218.59; December 31, 1947, $4,599.47.

Line 53 is the land for Farm No. 2. The information concerning the value and cost of that land is obtained from Government's Exhibits 9, 10, and 11. The balance as of December 31, 1945, is $3,200.00; December 31, 1946, $3,365.00; December 31, 1947, $3,365.00.

Q. Line 54.

A. That line consists of the buildings on what is known as Farm No. 3. The information on it for those buildings is contained in Government's Exhibit 11, and as of December 31, 1946, the cost was $1800.00; December 31, 1947, $1800.00.

Q. Now, with reference to line 55.

A. That is the land on Farm No. 3. Information concerning the cost of that land is contained in Government's Exhibit No. 11. The cost as of December 31, 1946, $3,240.00; December 31, 1947, $3,240.00.

Q. Now, line 56, Mr. Kleven.

A. That item represents stock in the Twin City Milk Producers Association, and the information on the cost of this asset is contained in Government's Exhibit 113. The balance—the cost as of December 31, 1942, was $110.00; December 31, 1943, the cost was $165.00; 1944, '45, '46, and '47, as of December 31st of each year, the cost was $165.00.

Q. Now, line 57, "Mortgages on Farms," can you explain that?

A. The information concerning Mortgages on Farms is contained in Government's Exhibits 106, 107, 166, 167, and 168. The balance on these mortgages as of December 31, 1941, was $4,394.75; as of December 31, 1942, $4,230.46; as of December 31, 1943, the balance is $4,059.53; no balance as of December 31, 1944, and December 31, 1945; the balance as of December 31, 1946, $1,072.18; and as of December 31, 1947, $990.15.

Q. Now, Line 58, Reserve for Depreciation, Buildings and Equipment,—can you explain that line?

A. That line is the reserve for depreciation on all buildings and properties on all of the Anoka Farms.

Q. Where did you get the information from which you computed that reserve for depreciation?

A. That information is contained in Government's Exhibits 6, 7, 8, 9, 10, and 11, the income tax returns. The balance as of December 31, 1941, $532.00; December 31, 1942, $1,951.86; December 31, 1943, $3,422.72; December 31, 1944, $5,102.79; December 31, 1945, $7,016.28; December 31, 1946, $9,081.25; and December 31, 1947, $12,235.14.

Q. How did you arrive at the figures under "Total Farm Investment"? Will you explain the figures under that?

A. I added up the black figures and added up the red figures and subtracted the red figures from the black figures to obtain a net total farm investment.

Q. By the red figures you mean the mortgages on farms in line 57 and the reserve for depreciation in line 58, is that correct?

A. That is correct.

Q. What balances did you arrive at?

A. Total farm investment as of December 31, 1941, $6,048.60; December 31, 1942, $33,322.46; December 31, 1943, $39,491.31; December 31, 1944, $50,327.55; December 31, 1945, $54,230.22; December 31, 1946, $68,593.88; December 31, 1947, $74,471.01.

Q. Now, I see that the next line is "Other Property", and under that line 59. Can you explain that?

A. That is personal residence located at 3817 Drew Avenue, and the information on that asset is contained in Government's Exhibits 33, 53, and the testimony of Hazel Aarhus, and the cost of that asset as of December 31, 1936, 1941, 1942, 1943, 1944, 1945, 1946, and 1947, is $11,500.00.

Q. Line 60, which has "3952 Beard Avenue," can you explain that? What property is that, which is in evidence here?

A. The information on that property is contained in Government's Exhibit No. 33, 55, 54, 206, and Government's Exhibits 1 through 8, inclusive. The cost basis of this property as of December 31, 1936 was $6,402.50; as of December 31, 1941, the cost basis $5,705.62; December 31, 1942, adjusted cost basis of $5,524.27; and as of December 31, 1943, the adjusted cost basis of $5,343.12.

Q. Will you explain, if you can, why you say the cost basis diminishes?

A. That is due to reductions by depreciation.

Q. Well now, departing here, I think I would like to have you explain, if you can, in taking what you call cost value, without reference to the chart, but in an ordinary net worth case, taking cost value—if a certain investment is made in

the house and then the market value of that house goes up, how do you carry that on your net worth analysis?

A. Are you referring to a personal residence?

Q. Yes.

A. It would be at the purchase price or cost basis.

Q. And would you pay any attention to the increase in market value of that house in the event that the market value went up?

A. No, that would have no effect under this kind of a determination.

Q. Did you depreciate line 59? A. No.

Q. Why not?

A. Because that is his personal residence and is not subject to depreciation.

Q. Then why did you depreciate line 60 as you say you did?

A. That is rental property and is subject to depreciation.

Q. (By Mr. Lord.) Now, will you go on to Line 61?

A. The information on this asset is contained in Government's Exhibits 46, 162, 163 and the testimony of Mr. Horn.

Q. Now, will you go on to line 62 and explain that?

A. The balance as of December 31, 1941, 1942, 1943, 1944, 1945, 1946 and 1947, was $2,100.00.

Q. Now, those balances you were referring to on line 61 which I omitted, and jumped ahead, is that correct?

A. That is right.

Q. Now, we will go on to line 62, if you please.

A. The information concerning the cost basis of this property is contained in Government's Exhibits 211, 164, 57, 56, 58, 204 and Government's Exhibits 6, 7, 8, and 9. The balance as of December 31, 1941, is $2,380.22; as of December 31, 1942, adjusted cost basis, $10,724.03; December 31, 1943, adjusted cost basis, $10,369.15; December 31, 1944, $10,696.87; December 31, 1945, $1,000.00; December 31, 1946, $1,000.00; December 31, 1947, $1,000.00.

Q. Can you explain the difference between the $10,696.87 and the $1,000.00 which you carried the next year?

A. That $1,000.00 represents the cost of one lot which was not sold with the house, when the house was sold in 1945.

Q. Mr. Kleven, will you explain line No. 63?

A. The information concerning the cost of the Oneida Building is contained in Government's Exhibits 188, 189, 213, 207, 47, 193, 188 to 192, inclusive, and Government's Exhibits 9, 10 and 11.

The cost basis as of December 31, 1944, $19,650.00; December 31, 1945, $20,862.17; December 31, 1946, $20,422.62; December 31, 1947, $32,358.33.

Q. Now, without going into all the details, Mr. Kleven, can you explain the difference between the 1946 figure of approximately $20,000.00 and the $32,000.00 which you carry in the '47 column?

A. Well, the building was actually sold in 1947 and the $32,000.00 figure represents the balance receivable on a contract for deed on the sale of that property.

Q. Will you explain line No. 64?

A. Information on the cost of this property contained in Government's Exhibits 61, 62, 63, 64, 65, 66 and 67, and the adjusted cost basis of this property as of December 31, 1943, $295.12; December 31, 1944, $295.12; December 31, 1945, $296.12; December 31, 1946, $296.12; December 31, 1947, $296.12.

Q. Now, line 65, "Hungry Jack Lodge," — will you explain that line?

A. The cost of Hungry Jack Lodge is taken from Government's Exhibits Nos. 70 and 71, and is $3,600.00 as of December 31, 1941, 1942, 1943, 1944, 1945, 1946, and 1947.

Q. Have you added the total in the various years as to the property which you call "Other Property"?

A. Yes, I have. The total other property as of December 31, 1936, is $17,902.50; December 31, 1941, $25,285.84; December 31, 1942, $33,448.40; December 31, 1943, $33,207.39;

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December 31, 1944, $47,841.99; December 31, 1945, $39,358.83; December 31, 1946, $38,918.74; December 31, 1947, $50,854.45.

Q. Now, how did you arrive at the figure "Grand Total Real Estate and Other Property," the line which appears at the bottom of this page?

A. That is the total of the total farm investment, plus the total of other property. That is, as of December 31, 1936, $17,902.50; December 31, 1941, $31,334.44; December 31, 1942, $66,770.86; December 31, 1943, $72,698.70; December 31, 1944, $98,169.54; December 31, 1945, $93,589.05; December 31, 1946, $107,512.62; December 31, 1947, $125,325.46.

Q. Mr. Kleven, turning to the next page of Government's Exhibit 225, headed "Liabilities: Loans Payable," and underneath the heading "Mortgages Payable," line 66, — can you explain that line?

A. That covers the mortgage and contract for deed on 3817 Drew Avenue. The Government exhibits used in determining these balances are Government's Exhibits 33, 60, 53, and 59.

Q. What was the last one please?

A. 59. The balance as of December 31, 1936 is $7,500.00; December 31, 1941, $2,075.98; December 31, 1942, $2,066.73; December 31, 1943, $1,187.87.

Q. Now, line 67.

A. That is the mortgage on 3952 Beard Avenue South. Government's Exhibits 33, 114, and 115. Balance as of December 31, 1936, $3,500.00; December 31, 1941, $2,120.00; December 31, 1942, $1,640.00; December 31, 1943, $1,160.00.

Q. Line 68?

A. That is a mortgage on 4400 East Lake Street. Government's Exhibits Nos. 162 and 163, 48, 49, and the testimony of Mr. Horn. The balance as of December 31, 1941, 1942, 1943, and 1944, and 1945 is $1,700.00.

Q. Now, Mr. Kleven, with reference to the entire page here I note the letters are in black. They represent liabilities, however, is that correct?

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A. That is correct.

Q. In some places you have put the letters in red. Can you explain that fact?

A. Well, they are in red when they are an offset to an asset, — when you subtract them from an asset and obtain a net valuation, net cost. Here we are totalling up all the liabilities and will in the next chart subtract them from the total of all the other assets in the first four pages.

Q. Then the fact that they are all liabilities would be the fact which causes them to be black, is that correct?

A. Yes.

Q. Now, shall we go to line 69?

A. The mortgage on 5238 Excelsior Boulevard, — Government's Exhibit 165. The balance as of December 31, 1942, $5,939.09; December 31, 1943, $5,190.40.

Q. Now, line 70, the Oneida Building.

A. The mortgage on the Oneida Building, — see Government's Exhibits Nos. 99, 50, 51, and 52. The balance as of December 31, 1944, $6,000.00; December 31, 1945, $5,400.00; December 31, 1946, $4,800.00.

Q. Have you totalled the mortgages payable?

A. Yes, I have.

Q. What did you find to be the totals?

A. The total mortgages payable as of December 31, 1936, $11,000.00; December 31, 1941, $5,895.98; December 31, 1942, $11,345.82; December 31, 1943, $9,238.27; December 31, 1944, $7,700.00; December 31, 1945, $7,100.00; December 31, 1946, $4,800.00; no balance as of December 31, 1947.

Q. I notice under the next heading "Loans and Accounts Payable," you have line 71, "Penn. Mutual Life Insurance Company,"—can you explain that line?

A. That is a loan on a life insurance policy and is shown in Government's Exhibits 33 and 194. The balance as of December 31, 1936 is $1,500.00.

Q. And line 72, can you explain that?

A. That is a loan payable to Harold H. Banks, and the information is contained in Government's Exhibit No. 33

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and the testimony of Harold H. Banks. The balance as of December 31, 1936, is $2,000.00; December 31, 1941, 1942, and 1943, it is $2,000.00.

Q. What accounts for the fact that you don't carry any balance after 1943?

A. That loan was repaid in 1944.

Q. Now, with reference to line 73, the Marquette National Bank, can you explain that line?

A. Notes payable to Marquette National Bank contained in Government's Exhibit No. 75. The balance as of December 31, 1941, is $4,500.00; as of December 31, 1942, it was $3,500.00.

Q. Now, line 74, the "First National Bank, Anoka, Minnesota" — can you explain that line?

A. Notes payable to the First National Bank, Anoka, Minnesota, contained in Government's Exhibit 81, and it shows a balance as of December 31, 1942 of $1,000.00.

Q. Line 75, the "Flour City Body Corporation," — can you explain that line?

A. 75 is a group heading for several accounts in the Flour City Body listed as lines 76, 77, and 78. The first one —

Q. That is line 76 you are referring to now?

A. Yes.

Q. "Officers Advances per Corporate Records," — and that has reference to the Flour City Body Corporation, is that correct?

A. Yes.

Q. All right. Now, explain line 76, if you will.

A. The balances shown on this liability were contained in Government's Exhibits 148 and 149. The balance as of December 31, 1941, was $38.47; December 31, 1942, $2,968.58; December 31, 1943, $3,484.66; December 31, 1944, $3,484.66; December 31, 1945, $3,484.66; December 31, 1946, $2,284.66; and in 1947 is a red figure because he had more than repaid his liability, so that there was a balance due him from the corporation of $462.62 as of December 31, 1947.

Q. Now, with reference to line 77, "Accounts Receivable per Corporate Records," — that again is Flour City Body Corporation, is it not?

A. Yes. Accounts Receivable in the name of T. W. Banks, shown in Government's Exhibits Nos. 216, 216-A, 217 and 217-A. The balance as of December 31, 1941, $2,816.13; December 31, 1942, $424.58; December 31, 1943, $322.29; and no balance was shown in the books after that date.

Q. Now, with reference to line 78, "Notes Receivable per Corporate Records," — that is in the Flour City Body Corporation too, is it not?

A. Yes.

Q. Will you explain that line, please?

A. The information on this item of Notes Receivable of the Flour City Body Corporation per corporate records is contained in Government's Exhibits 148 and 149, and a note in the amount of $1,500.00 is a balance as of December 31, 1942, 1943, 1944, 1945, 1946, and 1947.

Q. Now, Mr. Kleven, have you totalled the "Total Loans and Accounts Payable"?

A. Yes. The total loans and accounts payable as of December 31, 1936 is $3,500.00; as of December 31, 1941, $9,354.60; as of December 31, 1942, $11,393.16; December 31, 1943, $7,306.95; December 31, 1944, $4,984.66; December 31, 1945, $4,984.66; December 31, 1946, $3,784.66; December 31, 1947, $1,037.38.

Q. Now, have you made a grand total including the amounts under "Total Mortgages Payable," and "Total Loans and Accounts Payable"?

A. Yes, I have.

Q. What are those totals?

A. The grand total of loans and mortgages payable as of December 31, 1936, is $14,500.00; as of December 31, 1941, $15,250.58; December 31, 1942, $22,738.98; as of December 31, 1943, $16,545.22; December 31, 1944, $12,684.66; December 31, 1945, $12,084.66; December 31, 1946, $8,574.66; December 31, 1947, $1,037.38.

Q. Now, you have stated, have you not, that these are all amounts which Mr. Banks owes other people?

A. Yes.

Q. And the red figure is the one figure on the page where somebody else owed him, is that correct?

A. That is right.

Q. Well then, the fact that the balances here diminish, what would that indicate with reference to a person's net worth?

A. That would mean an increase in net worth by a reduction of liabilities.

Q. Now, referring your attention to the last page of Government's Exhibit 225, it says, "Net Worth — Thomas W. Banks" and "Assets." Will you tell me where you got the figures which you used in "Cash and U. S. Government Bonds" in the first line there?

A. That is the grand total as shown on sheet No. 1 for each year as listed.

Q. Now, "Receivables,"—where do you get your figures which you place in the column after "Receivables"?

A. That is the grand total as shown on page No. 2 for each of the years as listed.

Q. And "Investments"?

A. That is the grand total of page No. 3 for each of the years as listed.

Q. "Real Estate and Other Property"?

A. That is the grand total of page No. 4 for each of the years as listed.

Q. And do they all represent "Assets," — those four named items?

A. Yes, they do.

Q. Have you made a total of the amounts which were charged as assets on those other four grand totals?

A. Yes, I have.

Q. And what figures do you find?

A. Total assets as of December 31, 1936, $33,078.58; December 31, 1941, $53,619.46; December 31, 1942, $102,823.41;

December 31, 1943, $166,773.52; December 31, 1944, $243,-713.92; December 31, 1945, $283,052.99; December 31, 1946, $304,671.93; December 31, 1947, $323.914.72.

Q. And that you say is the "Total Assets"?

A. Yes.

Q. Now, I see a figure here "Less Liabilities, Loans Payable," — where do you get the figures which you used to arrive at those?

A. That is the grand totals from page No. 5, Loans and Mortgages Payable for each of the years as listed.

Q. Now, I note that that is under the "Total Assets." What have you done then on your chart?

A. I have subtracted the total liabilities from the total assets to arrive at a net worth at the end of each year.

Q. Will you tell me what you found to be the net worth for the various years?

A. The net worth as of December 31, 1936 was, $18,578.-58; December 31, 1941, $38,368.88; December 31, 1942, $80,-084.43; December 31, 1943, $150,228.30; December 31, 1944, $231,029.26; December 31, 1945, $270,968.33; December 31, 1946, $296,087.27; December 31, 1947, $322,877.34.

Q. How do you explain the next line, "Less Net Worth beginning of period"?

A. The net worth at the beginning of the period is subtracted from the net worth at the end of the period —

Q. (Interposing.) Please define period when you say that.

A. Well, in this case it is each — the first period is from December 31, 1936, to December 31, 1941. Each of the subsequent periods are individual years.

Q. Well, now, you took what he was worth at the beginning of the period and from that what did you subtract? Pardon me —

A. (Interposing) I took the net worth at the end of the period for the year and substracted it from the beginning.

Q. You subtracted the beginning from it, is that correct?

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A. Substract the beginning from it to obtain the net worth increase for the year or period.

Q. Now, what did you find to be the increase in net worth between the 31st day of December, 1936, and the 31st day of December, 1941?

A. That increase was $19,790.30.

Q. What did you find to be the increase in net worth for the period from December 31, 1941, to December 31, 1942?

A. That increase was $41,715.55.

Q. And the same with reference to the period December 31, 1942, to December 31, 1943.

A. $70,143.87.

Q. And what was the net worth increase for the period beginning with December 31, '43 and ending with December 31, '44?

A. $80,800.96.

Q. And the same with reference to the year beginning December 31, 1944 and ending December 31, 1945?

A. That increase was $39,939.07.

Q. And what was the net worth increase during the year beginning December 31, 1945 and ending December 31, 1946?

A. $25,118.94.

Q. And what did you find to be the increase in net worth for the year beginning December 31, '46 and ending December 31, '47?

A. $26,790.07.

Q. Now, "Non-taxable Income," I see is the next line on this exhibit, right under the "Increase in Net Worth." Can you tell me what you mean by "Less: Non-taxable Income"? What did you do with that Line? Explain it.

A. That line refers to the non-taxable portion of long-term capital gains — and non-taxable interest, or income.

Q. You should perhaps explain non-taxable gains, just briefly, so that we are sure we all understand it.

A. The non-taxable portion of capital gain would be 50 per cent of the profit made on the sale of a capital asset,

such as property or capital stocks, which have been held by the taxpayer for a period of over six months.

Q. Well then, the fact that you made some entries under "Less non-taxable gains," would that mean that you had found that certain of the income in that year was from the sale of capital stock or capital properties?

A. That is correct.

Q. And that some of the income there was exempt from taxation?

A. Yes.

Q. Well now, that you found some of that income was exempt from taxation, what have you done with it with reference to the total increase in net worth?

A. That has been subtracted from the increase in net worth to obtain the taxable increase in net worth.

Q. Mr. Kleven, I note that for the years '36 to '41, and the year '41, '42, and '43, you have made no entry of non-taxable income, is that correct?

A. That is correct.

Q. Now, will you tell me what non-taxable income you found in this taxpayer's activities during the year beginning December 31, 1943, and ending December 31, 1944?

A. The amount I found for that year was $1,653.97.

Q. And now the tax year ending December 31, '45, how much did you find?

A. $2,352.47.

Q. And the year ending December 31, '46, how much of that type of income did you find?

A. $104.73.

Q. And the year ending December 31, 1947, how much of that type of income did you find?

A. $2,283.28.

Q. Now, what have you done with that non-taxable income with reference to the increase in net worth?

A. I have substracted it from the total increase in net worth to obtain a taxable increase in net worth.

Q. What have you called the line where you entered those figures?

A. "Net Worth Increase of Taxable Income."

Q. And the figures I believe you have stated that you have not made any subtraction for the years up to and including 1943, is that correct?

A. That is correct.

Q. Then, the figures will remain the same on this list as they were on the increase in net worth line, will they not, for those years?

A. Yes, they will.

Q. The years which you have subtracted non-taxable income, will you give me the total result which you have entered in "Net Worth Increase of Taxable Income"?

A. For the taxable year ended December 31, 1944, the net worth increase of taxable income was $79,146.99; for the taxable year ended December 31, 1945, the increase was $37,586.60; for the year ended December 31, 1946, it was $25,014.21; for the year ended December 31, 1947, the increase was $24,506.79.

Q. Mr. Kleven, — I do not believe, — correct me if I am wrong — I do not believe we gave the sources from which we obtained the figures under non-taxable income, did we?

A. No, sir.

Q. Would you give them, please?

A. It would be the income tax returns for each one of those years, 1944 through 1947, Government's Exhibits 8, 9, 10, and 11, and Government's Exhibits 206, 54, 56, 204, No. 32, 85, 83, 98, and 95, and also from other information contained on the chart.

Q. Well, now, Mr. Kleven, "Net Worth Increase of taxable income," — I see under that you have "Plus Living Expenses." Can you explain that? Have you added living expenses on here?

A. Yes, I have.

Q. Can you explain why you have done that?

A. Well, a person's income for each year would be guided into ordinary living expenses and his savings which he acquired during the year, and the savings would represent his increase in net worth. The total of his savings and his living expenses would equal his income for the year.

Q. Well, then, what have you done with the living expenses and the increase in net worth? Is this what you would call the savings then, the increase in net worth?

A. Yes, that could ordinarily be conceived of as being the savings on a cost basis.

Q. And then the living expenses you say are expenditures?

A. Ordinary current living expenses.

Q. And totalled together they make the total of what the income should be, is that correct?

A. Well, including the income taxes, which are also—

Q. (Interposing) That is something else that is spent?

A. Yes.

Q. Well, now, will you tell us how you arrived at your figures for, — which you have under "Plus Living Expenses"?

A. The figures for living expenses were obtained from Mr. Weinstock's testimony and Mr. McKusick's testimony.

Q. Now, will you explain the exact figures you have on here?

A. The first figure there in 1941 of $30,000.00 represents five years' living expenses at $6,000.00 a year for a total of $30,000.00; the figure for 1942 is $10,000.00; for 1943, $10,000.00; for 1944, it is $10,000.00; 1945, $10,000.00; for 1946 it is $12,000.00; for 1947, it is $12,000.00.

Q. Now, "Federal Income Taxes Paid," — can you explain your purpose in setting that line where you did?

A. That is in the nature of a living expense, but it has been separated here so as to distinguish ordinary living expenses from federal income taxes paid, and that is something that you earn and pay out during the year and have no balance at the end of the year.

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Q. You mean, you did not have anything to show for the taxes you paid except what benefits you might get indirectly, is that what you mean?

A. That is correct.

Q. Now, will you explain your figures then and the source of your figures?

A. Those figures are in Government's Exhibit 201, which was entered by stipulation, and the total for the years from 1937 through 1941, inclusive, is $6,409.61; the year 1942, $267.66; for 1943, $17,366.35; 1944, $3,639.71; for 1945, $131.17; for 1946, $5,482.44; for 1947, $9,565.66;

Mr. Landrum: Mr. Lord, will you come here just a moment, please, sir? If the Court please, may the record show that the figures which he is now giving there, are the figures stipulated to by counsel and the stipulation is on record in this case. That is correct, is it not?

Mr. Kyle: With reference to income taxes paid?

Mr. Lord: Yes.

Q. (By Mr. Lord) Now, Mr. Kleven, you heard a stipulation read into the record with reference to the amount of income taxes paid, did you not?

A. Yes, I did.

Q. And these figures you took from that stipulation, is that correct?

A. That is correct. Those items represent the actual moneys paid during the year and not the assessments made on the tax returns.

Q. Well, then, you have another line that shows exactly what the assessments were according to what was reported, do you not?

A. Not on that chart.

Mr. Landrum: Go ahead, please.

Q. (By Mr. Lord) Now, Mr. Kleven, with reference to "Adjusted Gross Income of T. W. Banks and Rita Banks," what does that mean?

A. That represents the total of the taxable increase in net worth, plus living expenses and federal income taxes paid.

Q. What is the "Adjusted Gross Income," then — is that what you say that is?

A. Yes.

Q. Now, what is the first figure on that line? How many years does that represent?

A. That represents 1937, 1938, 1939, and 1941.

Q. What is that amount?

A. It is $56,199.91.

Q. And the next figure for the year ending December 31, 1942?

A. $51,983.21.

Q. That is income in one year? A. Yes.

Q. And the income in the next year, ending December 31, 1943?

A. $97,510.22.

Q. And the income for the year ending December 31, 1944?

A. $92,786.70.

Q. And the income for the year ending December 31, 1945?

A. $47,717.77.

Q. And the income for the year ending December 31, 1946?

A. $42,496.65.

Q. And the income for the year ending December 31, 1947?

A. $47,072.45.

Q. I note the next entry is "Less Income Reported by Rita Banks"—can you tell me how and why you put that line and those words down there?

A. Well, many of the assets that are listed in this net worth statement are in the name of Rita Banks and in the Government Exhibits No. 70 and 71 there is an explanation —

Q. Would you read that portion of Government's Exhibits 70 and 71, which has reference to your reasons for putting down Rita Banks' income tax paid and including her assets in this net worth chart? Those are the questions and answers that were submitted to Mr. O'Gordon, are they not?

A. Yes. I will read the preview here: "The investigation has disclosed certain assets and liabilities in the name of Rita Lee Banks; others in the name of Thos. W. Banks; and still others in joint tenancy.

"Question: (A) Does the acquisition of the joint tenancy assets mentioned above represent investments of income by Thomas W. Banks or by both he and Rita Banks?

"Answer: Thomas Banks.

"Question: (B) Does Thomas W. Banks consider Rita Lee Banks individually liable for cumulative net worth (as determined from assets in her name) in excess of funds available from her reported income, or does he hold himself liable for her excessive cumulative net worth?

"Answer: Rita Banks' assets acquired from Thomas Banks."

Q. Now, Mr. Kleven, I notice this question says, "Does Thomas Banks hold Rita Banks individually liable for cumulative net worth (as determined from assets in her name) in excess of funds available from her reported income * * * ?" Now, here you have a reported income, is that right?

A. Yes.

Q. And you are deducting that, is that correct?

A. I am deducting her reported income.

Q. Now, will you tell me where you got your figures which you enter under income reported by Rita Banks in the various years?

A. The income for that first period ending December 31, '41, was obtained from the Banks and Shepard partnership records.

Q. Did she report any income there herself?

A. I do not know if there was a return filed for it, but it showed as her distributive share of the partnership income.

Q. And you deducted that?

A. Yes. The figures following were obtained from her personal returns, Government's Exhibits Nos. 16 to 21, inclusive.

Q. What are those figures?

A. For the year of 1942, the figure is $464.65; for the year 1943, $478.63; for the year 1944, $1,030.68; for 1945, $1,374.38, for 1946, $948.40; 1947, $352.42.

Q. I believe, Mr. Kleven, we had just completed the line "Less Income reported by Rita Banks."

A. I think we went through the second line "Adjusted Gross Income of T. W. Banks."

Q. Well, then, we have gone through adjusted gross income for the various years, and you have read those figures, have you?

A. Yes.

Q. Now, the next line "Less Personal deductions per returns" — can you explain where you got the information there and what it means, — why you put that line where you did?

A. Those deductions are the deductions as shown per taxpayer's returns for the years of 1937 through 1947.

Q. What exhibits did you use?

A. With the exception that in 1945 two items classified under business deductions were considered as ordinary deductions, otherwise those items all represent the deductions as shown per Mr. Banks' returns.

Q. Do you have the exhibit numbers now for those returns?

A. The exhibit numbers 1 through 11, inclusive.

Mr. Landrum: Would you read those figures into the record?

The Witness: Personal reductions for returns for the years of 1937 through 1941, inclusive, are $10,781.38, 1942, $2,709.41; 1943, $2,164.65; 1944, $1,849.34; 1945, $2,653.28; 1946, $4,748.28; 1947, $4,266.96.

Q. (By Mr. Lord) Now, what have you done with the figures that you have just set out on that line?

A. Those have been deducted from the adjusted gross income to arrive at the "Corrected Net Income."

Q. What did you then find to be the corrected net income of Mr. Banks?

A. The corrected net income for the year ended December 31st, — the period from 1937 through 1941, $45,182.10; for the year 1942, $48,809.15; for the year 1943, $94,866.94; for the year 1944, $89,906.68; for the year 1945, $43,690.11; for the year 1946, $36,799.97; for the year 1947, $41,453.07.

Q. And the next line on the chart?

A. "Less Net Income as reported by taxpayer's return."

Q. What have you done with that?

A. Those are Exhibits 1 through 11.

Q. How much did he report for the period beginning December 31, 1936 and ending December 31, 1941?

A. $22,577.14; for 1942, reported $14,415.92; for the year 1943 he reported $21,307.01; for the year 1944 he reported $11,858.28; for the year 1945, he reported $20,170.11; for the year 1946 he reported $27,100.99; for the year 1947 he reported $20,609.29.

Q. What is the last line on this chart, Mr. Kleven?

A. That is "Unreported Income." That is the difference between "Corrected Net Income" and the "Net Income as Reported per return."

Q. Now, what did you find to be the unreported income of this man for these various years?

A. For the period of 1937 to 1941, inclusive, $22,604.96; for the year 1942, $34,393.23; for the year 1943, $73,559.93; for the year 1944, $78,048.40; for the year 1945, $23,520.00; for the year 1946, $9,698.98; for the year 1947, $20,843.78.

Mr. Lord: At this time, Your Honor, we reoffer in evidence Government's Exhibits 224 and 225.

Mr. Graff: If the Court please, we have the same objections that have heretofore been stated into the record with respect to both exhibits.

The Court: The exhibits are received.

Q. (By Mr. Lord) Mr. Kleven, assume that for the calendar year 1945 an individual filing on a cash basis had an adjusted gross income of $46,343.19, which included $2,352.48, recognized as a long-term capital gain, and had allowable deductions of $2,653.28, resulting in net income of $41,337.43, and assume that such individual is entitled to one exemption, what would his income tax liability be for that year?

Mr. Graff: Now, just a moment. We will object to the hypothetical question as now propounded to the witness on the ground that there is not sufficient foundation laid for the facts assumed in the question and on the further ground that the hypothetical question so propounded invades the province of the jury.

The Court: The objection is overruled. (To the witness) You may answer.

A. $22,719.28.

Q. (By Mr. Lord) Mr. Kleven, assume that for the calendar year 1946 an individual filing on a cash basis had an adjusted gross income of $41,548.45, which included $49.72, recognized as a long-term capital gain, and had allowable deductions of $4,748.26, resulting in net income of $36,750.45, and assume that such an individual is entitled to one exemption, what would his income tax liability be for that year?

Mr. Graff: May we have the same objection as to the previous question, Your Honor?

The Court: It may be understood. (To the witness) You may answer.

A. $16,386.51.

Q. (By Mr. Lord) Mr. Kleven, assume that for the calendar year 1947 an individual filing on a cash basis had an adjusted gross income of $45,720.03, which included $2,283.28 recognized as a long-term capital gain, and had allowable deductions of $4,266.96, resulting in net income of $39,169.79, and assume that such an individual is entitled to one exemption, what would his income tax liability be for that year?

Mr. Graff: May we make the same objecton that we did with reference to the year of 1945, Your Honor?

The Court: It may be understood.

A. $19,022.69.

Q. (By Mr. Lord) Mr. Kleven, state whether or not at our request there has been prepared under your general supervision and using your figures a further analysis to help to explain and depict the evidence in this case concerning the net income reported, the income tax which the Government claims should have been reported, and the unreported income in this case for the years '45, '46, '47?

A. Yes.

Q. (By Mr. Lord) Now, Mr. Kleven, I show you Government's Exhibit 226. Can you tell us what that is? If my question needs further explanation, I suggest that you do that now.

Mr. Hoffmann: Now, if the Court please, we suggest that the explanation not be an interpretation of an instrument not in evidence.

Mr. Lord: I am asking him what he prepared, Your Honor, and I think that that will help to clarify the exhibit which we propose to introduce. He is not going to give the figures.

The Court: Lay the foundation. I will rule on whether the exhibit is admissible or competent.

Mr. Landrum: Go ahead and answer as to what you did Mr. Kleven, please, sir.

A. This Exhibit No. 226, contains the taxable net income reported per tax returns for '45, '46, and '47, taxable net income as claimed by the Government for '45, '46, and '47.

Federal income taxes as reported, Federal income taxes Government claims should have been reported, Federal income taxes Government alleges should have been, but were not reported.

Q. (By Mr. Lord) Where did you get the figures from which you made this chart?

A. The figures for taxable net income reported are as shown in the taxpayer's returns, Government's Exhibits 9, 10, and 11. The taxable net income as claimed by the Government is the amount that is shown, with the exception of the 20-cent error, is the amount as shown in Government's Exhibits 225 and 224; and the Federal income taxes as reported are as shown per return for Government's Exhibits 9, 10, and 11. The other columns have ben computed with the use of income tax tables.

Q. Did you personally as a result of the evidence in this case make the computations which you show on the last two columns of this exhibit?

A. Yes, I did.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 226.

The Court: Well, when you said "this exhibit," you meant Exhibit 226?

Mr. Lord: Yes, Your Honor.

Mr. Graff: If the Court please, with respect to Exhibit 226, now a part of the exhibit is taken from the tax returns, but when you get to the second last column, we submit that the figures in there are conclusions of this witness and we object to the exhibit on the ground that it is a conclusion

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of this witness and is not evidence of a fact. May the general objection that we have to 224 and 225 also apply to 226?

The Court: That is agreeable. (To the witness). Are the figures in the last two columns of this exhibit anything more than a mathematical calculation?

The Witness: That is all, Your Honor.

The Court: You made the calculation?

The Witness: Yes, I did.

The Court: Well, now, have you an inquiry?

Mr. Lord: Yes, Your Honor. I think that he may have — there is something other than a mathematical computation that entered into this,—isn't there, Mr. Kleven?

The Court: No, I said the data in the last two columns. Did those columns contain anything except the calculations of this witness?

Mr. Lord: Apparently that is all, Your Honor.

The Court: The exhibit is received.

Q. (By Mr. Lord) Mr. Kleven, will you state whether or not for the purpose of further illustration and clarification, and for the purpose of helping this Court and jury further understand and interpret the evidence in this case, there has been prepared under your general supervision and direction an enlargemnt of Government's Exhibit 226 in such size and form as can be seen by all the jury and the Court at one time?

A. That is correct.

Mr. Hoffmann: In order to expedite matters, Your Honor may all of the objections noted in the record with respect to Exhibit 226 apply to the proposed Exhibit now to be marked by the Clerk?

The Court: That is agreeable.

Q. (By Mr. Lord) Mr. Kleven, I show you Government's Exhibit 227 for identification. Is that the exhibit which has been prepared under your direction, reflecting the entries in Government's Exhibit 226?

A. Yes, sir.

Mr. Hoffmann: May the record show that my statement a moment ago may apply to the exhibit now marked 227?

The Court: That may be understood.

Q. (By Mr. Lord) Are the figures thereon contained the same figures which are set out in Government's Exhibit 226?

A. Yes, they are.

Mr. Lord: At this time, Your Honor, we offer in evidence Government's Exhibit 227.

Mr. Graff: I think our position with respect to Exhibit 227 has already been stated, Your Honor, and we make the same objections to 227 as we do to 226 and 224 and 225, as have been heretofore taken.

The Court: The exhibit is received.

Q. (By Mr. Lord) Now, Mr. Kleven, referring your attention to Government's Exhibit 227, can you tell me just what it is?

A. As stated in the heading.

Q. And for the record, will you tell me what is stated in the heading?

A. Analysis of testimony-income taxes—Thomas W. Banks.

Q. Now, with reference to the first column, will you tell me what that is, — what is the heading?

A. "Year." 1945, 1946, 1947.

Q. And after that in the next column, will you tell me what the heading is?

A. "Taxable Net Income Reported by Thomas W. Banks per Tax Returns."

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Q. And what is the amount for 1945?

A. $20,170.11.

Q. What is the next column?

A. "Taxable Net Income as claimed by Government."

Q. And what is that? A. $43,690.11.

Q. That is for the year 1945, is it not?

A. For the year 1945.

Q. What is the next column?

A. "Federal Income Taxes as reported," for 1945.

Q. And what is it? A. $7,675.27.

Q. What is the next column?

A. "Federal Income Taxes Government claimed should have been reported."

Q. What is that for the year of 1945?

A. $22,719.33.

Q. What is the next column?

A. "Federal Income Taxes Government alleges should have been but were not reported."

Q. And what is that amount for 1945?

A. $15,044.06.

Q. Now, for the year 1946, will you tell me the taxable net income reported by Thomas W. Banks per tax returns?

A. $27,100.99.

Q. And what taxable net income as claimed by the Government for the year 1946?

A. $36,799.97.

Q. And how much income tax did Mr. Banks report for the year 1946?

A. $10,556.98.

Q. What is the amount of Federal income taxes the Government claimed should have been reported?

A. $16,386.39.

Q. What is the amount of Federal income taxes that the Government alleges should have been reported but were not reported?

A. $5,829.41.

Q. Now, with reference to the year 1947, can you tell me the taxable net income reported by Thomas Banks per his returns?

A. $20,609.29.

Q. And what is the taxable net income as claimed by the Government for that year?

A. $41,453.07.

Q. Now, how much Federal income taxes were reported by Mr. Banks for the year 1947?

A. $6,955.14.

Q. What is the amount of Federal income taxes the Government claims should have been reported for the year 1947?

A. $19,022.69.

Q. Now, what is the amount of Federal income tax that the Government alleges should have been reported but were not reported for the year of 1947?

A. $12,067.55.

CROSS EXAMINATION

By Mr. Graff:

Q. Mr. Kleven, I understand you are presently employed as a revenue agent in the Bureau of Internal Revenue of Minneapolis, Minnesota, is that correct?

A. That is correct.

Q. And that you have been so employed for approximately six years, is that right?

A. That is right.

Q. Now, in connection with the matter before the Court, was it your job to take the material which had been collected by Mr. McKusick and attempt to correlate that information?

A. That was part of my job.

Q. Did you make any independent investigation at all of the matters pertaining to the taxpayer?

A. Most of the time Mr. McKusick and I were together, but I may have made some independent investigation.

Q. By and large would you say that the independent investigations conducted by you were a relatively small part of the entire investigation?

A. Yes, I would.

Q. And the majority of the investigative work which was done was done by Mr. McKusick and the others?

A. I assisted him after I started in the case.

Q. Yes, and you got into the case sometime in January of 1951?

A. That is correct.

Q. And after you got into the case and after you had an opportunity of going over all the material that Mr. McKusick had assembled, and made the independent investigation that he made, did you then start putting your figures together, so to speak?

A. Yes, about that time I did.

Q. And about when was it that you started, so to speak, to put your figures together?

A. Oh, I could not give you any exact date now.

Q. Approximately?

A. It would be in the spring of 1951.

Q. On your direct examination you indicated that you worked on this matter from January, 1951, until you completed your report in May of 1951?

A. Correct.

Q. And then you did not further work on this case until you were called over to the United States Attorney's office in January of 1952?

A. That is correct.

Q. And that since January of 1952, you have been working more or less steadily on this case?

A. That is correct.

Q. Now, Mr. Kleven, when you prepared Exhibit 224 and 225, did you include therein for the period December 31, 1936, to and including December 31, 1947, all of the property of the taxpayer?

A. Are you asking about the entire exhibit or just referring to the first page?

Q. The entire exhibit, for the entire period.

A. To the best of my knowledge, all the property that we could find.

Q. I am asking you, Mr. Kleven, — did you include it all?

A. Yes, to the best of my knowledge, I put in everything that I could find.

Q. Now, Mr. Kleven, did you make any search or investigation to find any other property owned by the taxpayer during the period December 31, 1936 to December 31, 1947?

A. Will you read that question, please?

(The question was read.)

A. Didn't I just answer that? Wasn't that the question you asked me before?

Q. No.

A. I do not quite understand that question.

Mr. Graff: May it be read to him again, if Your Honor please?

The Court: You will read it, Mr. Reporter.

(The question was reread.)

A. Other property than what?

Q. (By Mr. Graff) Than that disclosed on Exhibits 224 and 225.

A. Yes, we made a search —

Q. (Interposing) No, did you make any search to find any other property belonging to this taxpayer for the period December 31, 1936 to the period December 31, 1947?

A. Yes, I did.

Q. Did you find any?

A. No, — I found some different valuations.

Q. Did you find any other property?

A. No, I found no other property.

Q. I see. Now, Mr. Kleven, did you personally find any other assets or liabilities of the taxpayer other than disclosed by Exhibits 224 and 225?

A. I would say that we found some minor negligible items that are not included.

Q. Not "we," — I am asking you personally, Mr. Kleven.

A. Well, I have seen a couple of items, —

Q. Did you personally find any?

A. You mean my own personal investigation?

Q. You, Mr. Kleven, did you personally find any?

A. I do not know if I found them. I was aware of them.

Q. You can answer it, I think, very simply, either you found some or you didn't find some.

A. Oh, I found some. I was not the original finder, I would say.

Q. Did you find some assets or liabilities which you did not include on Government's Exhibits 224 and 225?

A. Yes, I did.

Q. Then Exhibits 224 and 225 that you have introduced into this court does not include all the assets and liabilities that you found of this taxpayer, is that correct?

A. It is to the extent that they are so negligible that they are unimportant in this case.

Q. So you determined, did you, Mr. Kleven, that you would not bring in here all the assets and liabilities of this taxpayer?

A. Yes, — I will explain one of them. One of them is —

Q. (Interposing) Just a moment. Just answer my questions.

Mr. Landrum: If the Court please, I submit that he is asking to be permitted to explain.

Mr. Graff: I beg to differ with counsel, Your Honor. This is our opportunity to ask this witness questions and I suggest that he be asked to answer our questions.

The Court: We must be fair with the witness, of course. (To the witness) If you can explain in a few words, you may do so.

The Witness: Yes, I will. Thank you, Your Honor.

There is one asset listed in the taxpayer's affidavit of some land down in Texas that said that he paid $2.00 or $3.00 a year real estate taxes on it, and we did not make a complete investigation to see what the cost of that property was.

The Court: So you left that asset, if it is an asset, out of the report?

The Witness: Yes, we left it out of the report.

Q. (By Mr. Graff.) Now, Mr. Kleven, is that the only asset of this taxpayer that you omitted from Government's Exhibits 224 and 225?

A. There is one other one that I know of.

Q. Will you tell us about it, please?

A. And that is the one that you were questioning Mr. McKusick about earlier, the Northwest Novelty Company, which was a partnership venture which dealt in some type of coin machines and which did not have a capital investment. At the end of the year the total investment for the partners was approximately $200.00 and it was so neglible that we did not take it into account in our calculations.

Q. I am not asking you, Mr. Kleven, what you as a group did. You have come here and testified as an individual, have you not?

A. Certainly.

Q. And you have come here and testified that you prepared Government's Exhibits 224 and 225?

A. That is correct.

Q. And you have come here and testified that you have made the calculations?

A. Yes, sir.

Q. Now, did you, Mr. Kleven, determine that you were not going to include the investment of this taxpayer in Northwestern Novelty Company?

A. Did I determine that?

Q. Yes. A. Yes, I did.

Q. You determined, then, to omit from Exhibits 224 and 225 this land that you described in Texas?

A. That is correct.

Q. And the investment in the Northwestern Novelty Company in Minneapolis. Now, did you decide—you personally—to omit any other assets from Exhibits 224 and 225?

A. No, I did not.

Q. Then it is your testimony, Mr. Kleven, that with the two exceptions that you have now given us, Government's Exhibits 224 and 225 include all of the assets of this taxpayer?

A. All that I am aware of.

Q. And if there should be some assets, Mr. Kleven, that are not included on Exhibits 224 and 225, then those reports are in error, are they not?

A. If there are any assets of a substantial nature, it might make them in error.

Q. Yes. Now, you made the computations on Exhibit 224 on the basis of the so-called "Net worth method", did you not?

A. Yes, I did.

Q. And you used as your starting point the date of December 31, 1936, is that correct?

A. That is correct.

Q. Now, if the material, Mr. Kleven, that you used for your starting point is incorrect, then all of your calculations must necessarily be wrong?

A. I would not say all of them.

Q. Isn't it a fact, Mr. Kleven, that all of the figures that you have on Exhibits 224 and 225 are predicated upon the assumption that your starting point of December 31, 1936 is correct?

A. It is predicated on that assumption.

Q. Yes. And if that assumption is incorrect, then, of course, the whole thing must fall?

A. I would not say that.

Q. You would not say that. What would you say?

A. I would say if there was some small assets that might be some—that we did not find, that was not included in the affidavit, that it would be absorbed.

Q. And would be absorbed by what?

A. Probably in the first year or two.

Q. I see. And how would it be absorbed?

A. In the unreported income.

Q. It would be absorbed in unreported income?

A. Yes.

Q. That is your answer? A. That is correct.

Q. And if there was no unreported income, how would it be absorbed?

A. It would not be. It would not be absorbed.

Q. Now, when you prepared Government's Exhibit 224, did you have the option of selecting whether you were going to use December 31, 1936, or December 31, 1937, as your starting point?

A. Did I have the option?

Q. Yes.

A. Certainly I had the option.

Q. And it was your determination to use December 31, 1936, as the starting point?

A. That is correct.

Q. And you could have, if you so desired,—could have used the starting point of December 31, 1937?

A. Yes.

Q. Now, would you be good enough to tell us why you selected December 31, 1936, instead of December 31, 1937?

A. Yes, I will. I had the records from the prior revenue agents who completed a fraud report on Mr. Banks covering the years 1920 to 1933—

Mr. Graff: (Interposing.) Well, now, just a moment. I object to the characterization of the kind of report that this witness is testifying to.

The Court: You may proceed.

A. (Continuing.) This covered the period of 1920 to 1933 and was based on a net worth basis. I took the ending net worth as shown in that report and worked it down to the basis at the end of 1936 which—

Q. (By Mr. Graff.) Do you have that—

Mr. Landrum: (Interposing.) Let him finish it, please.

A. (Continuing.) —which balanced out with the affidavit as shown in the records.

Q. (By Mr. Graff.) I see. You were satisfied, Mr. Kleven, that the affidavit balanced out, so to speak?

A. Yes, I was.

Q. I see. And do you have that report with you that you relied upon in selecting December 31, 1936 as your starting point?

A. What report?

Q. You referred to a report here in evidence that you used in selecting that date as your starting point.

A. That report is not in evidence.

Q. I did not ask you that. I asked you whether you had it with you?

A. I do not have the complete report. I have the balance sheet.

Q. Now, Mr. Kleven, on Exhibit 224 you show what figure of cash in the possession of the taxpayer as of December 31, 1936?

A. $159.15.

Q. What proportion of the $159.15 was in the possession of Rita Banks as of December 31, 1936?

A. That was all in the name of Rita Banks, in her bank account.

Q. I see. And the amount of that again was how much? I am sorry, I could not get the amount.

A. $159.15.

Q. I see. And how much cash did the taxpayer Tom Banks have in his possession as of December 31, 1936—and I would like to have you refer me to the exhibit upon which that answer is contained.

A. He had none.

Q. Now, would you give me the exhibit reference number? What is the exhibit reference number that proves that fact?

A. Well, I could not count the cash he had in his pocket twelve years ago.

Q. Just a moment, Mr. Kleven. I asked you to give us, if you please, the exhibit number that is in evidence in this case that proves the statement that you have made.

A. Exhibit No. 33, the affidavit reported no cash.

Q. I hand you, Mr. Kleven, Government's Exhibit 33, which has been identified as an affidavit dated July 2, 1937, and I would like to have you point out to this Court and jury what is contained in that affidavit which shows that the taxpayer, Tom Banks, had no cash on December 31, 1936.

A. The total of the assets listed in this affidavit are about $13,000.00. We have set them up here at about $18,000.00.

Q. Would you please point out to me in Government's Exhibit 33, the statement or statements which show that Tom Banks had no cash on December 31, 1936?

A. There is no statement, but I can work it back by analysis.

Q. There is no statement in that exhibit?

A. No, not as of December 31, '36.

Q. I see. And there is no exhibit in evidence in this case, is there, Mr. Kleven, to which you can point which proves that Tom Banks had no cash on December 31, 1936?

A. Well, you can say that as far as personal cash for every single year on the whole balance sheet.

Q. Well, just take '36 first.

A. Yes.

Q. So there is no exhibit in evidence in this court which shows how much cash Tom Banks had as of December 31, 1936? That is correct, is it not?

A. That is correct.

Q. Is there any testimony in this case that you have heard that establishes the amount of cash that Tom Banks had in his possession on December 31, 1936?

A. I do not recall any.

Q. Now, Mr. Kleven, would you be good enough to tell me what exhibit is in evidence before this Court which shows the amount of cash that Tom Banks had in his possession on December 31, 1937?

A. There is none.

Q. Isn't it true, Mr. Kleven, that there isn't a single exhibit which is in evidence before this Court which shows the amount of cash which Tom Banks had in his possession on December 31st, for the year '36 to '47, inclusive?

A. There are no exhibits except the bank accounts.

Q. Now, those are what exhibits?

A. Exhibit No. 72—

Q. (Interposing.) All right, let us take them one at a time. Now, 72 is a ledger card, is it not, of a bank?

Exhibit 72, I think, has been identified as a ledger card of the Marquette National Bank of Minneapolis showing deposits, or showing the account of Thomas W. Banks. Is that right?

A. Yes, it is.

Q. Now, does Exhibit 72 show the total amount of cash that Tom Banks had in his possession as of December 31st for any of the years reflected by Exhibit 72?

A. It gives the bank balances at the end of the year.

Q. It will give a bank balance, but it does not give the total cash that he had as of that time, would it?

A. No, he had other bank accounts.

Q. Yes. And Exhibit 72 does not purport to give the total cash that Tom Banks had as of December 31st of any given year, does it?

A. No, it does not.

Q. It only shows the amount that he had to his credit in that particular bank account?

A. That is correct.

Q. So let me ask you the question again: Is there any exhibit which is in evidence before this court which gives the total amount of cash that Tom Banks had as of December 31st, of any year for the years '36 to '47?

A. The total is shown on Government's Exhibits 224 and 225.

Q. That is your calculation, is it not?

A. That is correct.

Q. Are there any exhibits in evidence before this Court which show, other than 224 and 225, the total amount of cash that Tom Banks had as of December 31st for the years '36 to '47, inclusive?

A. No, sir, those are the only ones in court.

Q. Now, Mr. Kleven, other than your testimony concerning Exhibits 224 and 225, there was no testimony adduced in this court showing the total amount of cash that Tom Banks had in his possesion as of December 31st for the years '36 to '47, inclusive? Isn't that right?

A. Will you read that question to me again, please?

(The question was read.)

A. I think his affidavit showed no cash.

Q. I think my question concerned testimony,—the affidavit has been identified as Exhibit 33.

Mr. Landrum: He has been asking about exhibits. Now, the witness has told him one, Your Honor.

Mr. Graff: Just a moment, if the Court please. I have a question pending and I would like to have the witness answer it.

The Court: If there is any further answer you can give to the question, you may do so.

A. Do you mean oral testimony?

Q. (By Mr. Graff.) Yes.

A. No, I do not recall any oral testimony.

Q. There wasn't any, isn't that a fact?

A. There wasn't any cash?

Q. Mr. Kleven, there was no oral testimony—

A. (Interposing.) I stated there wasn't.

Q. Yes. Now, Mr. Kleven, I notice from Exhibit 224 that it has reports for the year 1936, but it omits the years '37, '38, '39, and 1940, isn't that correct?

A. That is correct.

Q. And that is likewise true of Exhibit 225?

A. That is correct.

Q. Now, Mr. Kleven, I would like to direct your attention to the item 9, "Bonus Bond", $200.00. First of all, what kind of a bond was that?

A. One mentioned in Mr. Banks' affidavit.

Q. I see. And did you accept that description of the bond as being true and correct?

A. Yes, whatever he said it was, we accepted.

Q. You accepted it. And you accept as correct the statements that taxpayers make as a general rule?

A. Under conditions like this, we do.

Q. In other words, if the situation is one where it is convenient for you to accept it, you accept it and when it is not convenient for you, you reject it, is that right?

A. Well, we always would accept the statement made by the taxpayer when he is making it voluntarily against his interest. That is always accepted.

Q. You always accept that. And do you always accept it as true?

A. I would not say always about anything like that.

Q. Well, shall we say that sometimes you do and sometimes you do not?

A. Depending upon the circumstances of the individual.

Q. Surely. Now, I direct your attention to this Bonus Bond. You have it here as of December 31, 1936, is that correct?

A. Yes, sir.

Q. And Exhibit 33 stated that that was a bond of the United States, did it not?

A. Yes, it did.

Q. And did you or any of your people check to determine whether in fact that bond had been issued by the Treasury Department and was outstanding as of December 31, 1936?

A. There wasn't sufficient information to request anything about it.

Q. Mr. Kleven, the reason why no inquiry was made concerning what has been identified as the Bonus Bond in the sum of $200.00 was because you did not have sufficient information concerning it or to identify it?

A. That is right.

Q. And isn't it true, then, that you personally made no effort to identify that bond in the sum of $200.00?

A. No, I took it at face value on the affidavit.

Q. Yes. And was that bond outstanding as of December 31, 1937?

A. From the information I have already told you, I could not identify it,—I could not request any information on it.

Q. So you do not know when the bond was redeemed, if it ever was redeemed?

A. No, I do not.

Q. And neither do you know the amount or the date when it would have been redeemed?

A. No.

Q. The Government, of course, keeps records of bonds issued by it and redeemed by it? You are familiar with that fact, are you not?

A. Oh, yes, they do.

Q. Mr. Kleven, in connection with your work as a revenue agent in connection with this case, did you ever run into any stock of the Old Peoria Company?

A. I noticed that in one of the returns.

Q. You noticed it in a return?

A. Yes, in one of the taxpayer's returns.

Q. And what did you notice in one of the taxpayer's returns about Old Peoria stock?

A. That it had been sold.

Q. And did you notice when it was sold?

A. It was between '36 and '41.

Q. I see. Was the Old Peoria stock an asset of the taxpayer as of December 31, 1936?

A. No.

Q. And you did not include it on Exhibit 224?

A. No, sir.

Q. If the fact was that the taxpayer owned that stock on December 31, 1936, then Exhibit 224 and 225 would be off to that extent, would they not?

A. So would his affidavit.

Mr. Graff: I submit, Your Honor, that is not an answer to my question.

The Court: That is not an answer.

The Witness: I am sorry. If he had owned it prior to 1936, it should have been included as of December 31, 1936.

Q. (By Mr. Graff.) Didn't you have evidence before you that the taxpayer did own it prior to December 31, 1936, and sold it sometime later?

A. No, I did not.

Q. I show you Government's Exhibit 4, which has been identified as the tax return for 1940 of Tom Banks, and ask you if there aren't sales of stock reflected on that Exhibit 4?

A. Yes, there are.

Q. There are, as a matter of fact, two entries, are there not?

A. Yes, there are.

Q. One entry shows that stock was acquired by the taxpayer on August 1, 1935?

A. Yes.

Q. And was sold by the taxpayer on September 15, 1940?

A. The return so states.

Q. So on the basis of Government's Exhibit 4, which you had before you in connection with the work that you did as a revenue agent in this case, you had information that there were stocks which were owned by the taxpayer on August 1, 1935, and were sold by the taxpayer on September 15, 1940, is that correct?

A. Yes, the return showed the date, but that is not evidentiary as far as a revenue agent is concerned.

Q. My question was, Mr. Kleven, that you had information from Government's Exhibit No. 4—and I mean you personally had information—that the taxpayer had stocks on August 1st—had acquired stocks on August 1, 1935, which he sold on September 15, 1940?

A. Yes, I had that information on the returns.

Q. Now, what personal investigation, if any, did you make to determine the identity of the stock disclosed on the return of the taxpayer, Government's Exhibit 4, and which showed he had acquired it on August 1, 1935, and he had sold it on September 15, 1940?

A. I first looked at the prior revenue agent's report. Subsequently I looked at the affidavit, which did not include this stock, and, thirdly, I read the special agent's report on the old case and that disclosed that that stock was not owned by the taxpayer as stated in the return.

Q. And you accepted somebody else's conclusion, Mr. Kleven, concerning the stock which was included on the taxpayer's return for 1940, Government's Exhibit 4, is that correct?

A. I accepted the conclusions of the agents and of the affidavit.

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Q. And you rejected the evidence contained in Government's Exhibit 4?

A. I would not consider that evidence.

Q. Didn't you testify here in court about all the facts and figures that you have gotten from tax returns that were in evidence before this Court?

A. I testified as to facts and figures that were contained in those returns.

Q. And did Exhibits 224 and 225, as prepared by you, include the stocks which were shown in the taxpayer's return for the year 1940, identified as Government's Exhibit 4?

A. The question gets so long. Will you repeat that, please?

The Court: I think that question has been answered in this witness' testimony. (To the reporter.) Read the question, Mr. Reporter.

(The question was read.)

The Court: You may answer.

A. It is not identified as such on those exhibits.

Q. Well, in your answer—in view of your answer, is it on Exhibits 224 or 225 at all?

A. It would be in the net result or the net worth as of the end of '41.

The Court: They are not specified on the exhibits, counsel. That is very clear, and there is no use to spend time on it, as far as that is concerned. There is no contention that they are specified on the exhibits. I have no desire to limit counsel unduly, but at the same time I desire to make progress in the trial.

Mr. Graff: Well, I appreciate that, Your Honor, I am sure Your Honor will bear in mind that this witness started, I think yesterday afternoon, and was on direct examination for a long period of time.

The Court: That is correct.

Q. (By Mr. Graff.) Now, Mr. Kleven, when you did your work as a revenue agent in this case, did you have before you evidence that the taxpayer had received a dividend or income from a partnership known as Shepard and Garland?

A. Yes, I recall that.

Q. And does Exhibit 224 or 225, as prepared by you, show any interest that the taxpayer had in Shepard and Garland for the period December 31, 1936 to December 31, 1947?

A. No, it doesn't show any interest for that partnership.

Q. And yet you had information from Government's Exhibit No. 5, which is the tax return for the year 1941 of the taxpayer, that he had an income of $1,167.92 for 1940 from Shepard and Garland?

A. Right. That partnership was similar to the other one I described before, the Northwest Novelty Company. The money came in and went out during the year so there was no balance for an investment at the end of the year, or if there was, it was negligible.

Mr. Graff: Well, just a moment, if the Court please. I think this is a voluntary statement being made by this witness, not in answer to any question.

The Court: You may read the question and answer, Mr. Reporter.

(The question and answer were read.)

The Court: You may proceed.

Q. (By Mr. Graff.) Did you personally make the investigation in Shepard and Garland?

A. I examined the returns. I do not believe I examined any books.

Q. I see. And if that is true, Mr. Kleven, how did you know what you have just stated a short time ago regarding Shepard and Garland?

A. I believe they had some form of a balance sheet on them, on the returns which indicated the net investment.

Q. Would there be a balance sheet on a partnership return, Mr. Kleven?

A. Ordinarily there is.

Q. For the period of 1941?

A. I do not know about '41.

Q. It came after that, didn't it?

A. I do not recall.

Q. On Government's Exhibits 224 and 225 is an item "T. E. Ewing" and you have shown on Exhibit 224 that that amount was a receivable as of December 31, 1944. Do you have that before you?

A. (No answer.)

Q. You also show that as a receivable as of December 31, 1945, 1946, and 1947. Other than Exhibits 70 and 71, is there any exhibit to which you can direct our attention showing that that amount of $10,000.00 should be listed as a receivable for any of the years as of December 31, 1945, 1946, and 1947?

A. I do not believe so.

Q. And it was, therefore, your conclusion from reading Exhibits 70 and 71, that that receivable was outstanding as of December 31, 1945, 1946, and 1947?

A. My personal conclusion, plus the conclusion of my associates.

Q. It was not your own personal conclusion?

A. I say "plus".

Q. Now, Mr. Kleven, I understand your answer to the last question that it was your conclusion and the conclusion of some of your associates, is that correct?

A. That is correct.

Q. Well, then, is it true, Mr. Kleven, that Exhibits 224 and 225 represent conclusions not only of you but also of some of your associates?

A. Well, I have been assisted — I mean, Mr. McKusick and I have worked this case jointly.

Q. I see. I understood your direct testimony to be that you were the one who had prepared Exhibits 224 and 225.

A. I did.

Q. But it now appears that someone else assisted you with it?

A. In gathering the figures and in making conclusions that I finally adopted in the report.

Q. I see. So that the exhibits as now constituted not only represent your conclusions but they represent conclusions of other people who assisted you?

A. Certainly.

Q. Mr. Kleven, would you turn to page 3 of Exhibit 224?

A. Yes, sir.

Q. Now, I direct your attention to the item identified as item 27, "Merchants Distilling", where you show the amount as outstanding on December 31, 1946 in the amount of $9,380.91.

A. Yes, sir.

Q. Where did you get that item?

A. Exhibit Nos. 87 and 83, and the taxpayer's return, Exhibit No. 11.

Q. Now, isn't it true, Mr. Kleven, that on the taxpayer's return No. 11 for the year 1937, the item 27, "Merchants Distilling" stock was sold during the year 1947?

A. If I could see the return I would be sure—

Q. (Interposing.) Surely.

(Document shown to the witness.)

A. It shows that it was sold in 1947.

Q. And what does Government's Exhibit 11, being the taxpayer's tax return for the year 1947, show as the cost of those shares of stock?

A. $8,420.19.

Q. And the figure you have on Exhibits 225 and 224 is $9,380.19?

A. Correct.

Q. So that your figure on Exhibit 224 differs from the figure on the taxpayer's return, Exhibits No. 11?

A. That it does.

Q. Now, Mr. Kleven, I direct your attention to Item 30, Mohawk Liquor Corporation. You have that listed as $750.-00 as of December 31, 1941 and for the years continuing to and including December 31, 1945, is that right?

A. Yes, sir.

Q. And you indicated on your direct testimony that that figure was derived from Exhibit No. 10 as well as Exhibit No. 33, is that correct?

A. Exhibit No. 33 was used for reference and in which that stock was not indicated.

Q. Now, did you make any personal investigation to ascertain when that stock in the Mohawk Liquor Corporation was acquired?

A. I made the investigation of the affidavit to determine that it wasn't as of that date.

Q. Mr. Kleven, wouldn't it have been an easy matter to check with the Mohawk Corporation to find out about that particular stock?

A. It may have been.

Q. In any event, you didn't do it ?

A. I didn't.

Q. You didn't consider it of sufficient importance to do so?

A. No, it wasn't of sufficient importance.

Q. You didn't regard it as such?

A. No.

Q. On the tax return, Government's Exhibit 10, it is disclosed, is it not, that the hundred shares of stock in the Mohawk Liquor Corporation were acquired by the taxpayer in 1936 and were sold by him during the year 1946?

A. The return so states.

Q. And the return shows that it was sold at a gain over the purchase price?

A. If I remember correctly, it does.

(Document shown to the witness by Mr. Graff.)

A. (Continuing.) Yes.

Q. So the taxpayer had possession of this stock in 1936 as far as disclosed by Government's Exhibit 10 is concerned, is that correct?

A. Yes, the return shows that.

Q. Yes. And you elected, shall we say—you personally—to not include it in the statement as of December 31, 1936?

A. I relied on the affidavit which the taxpayer filed July 2, 1937, which he filed with the United States Government, and in which he did not list that stock and in which he listed many other worthless stocks.

Q. And you had the information before you in the tax return when you prepared Exhibits 224 and 225 as to the date of acquisition of the stock and the date of its sale, did you not?

A. No, I did not have it, except the affidavit.

Q. You also had the information before you, Mr. Kleven, did you not, that was contained in Government's Exhibit 10?

A. Yes, I had that.

Q. And you ignored the information?

A. That is correct.

Q. Now, Mr. Kleven, I direct your attention to Item No. 32 of Government's Exhibits 224 and 225, which shows "Cities Service" stock at the end of '36 and '41 to '47, inclusive, as 82,819.53. That is correct, is it not?

A. Yes, sir.

Q. Now, directing your attention to December 31, 1947, on what exhibit or exhibits do you base your conclusion that that stock was outstanding at that time?

A. On Government's Exhibits 1 to 11, inclusive, in which the sale of that stock was not reported.

Q. Now, Mr. Kleven, assuming that a taxpayer had some stock and assume further that he sold the stock and sustained a loss as a result of the sale of that stock, would he have to report that loss in his tax return?

A. I do not know.

Q. So you could not determine absolutely, could you then, from Exhibits 1 to 11 that the taxpayer had not disposed of that Cities Service stock, could you?

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A. It is reasonable to assume that if he had a loss, he would have claimed it.

Q. That was an assumption on your part?

A. Certainly.

Q. And if he sold it exactly for what he paid for it, then would it be equally reasonable to assume that he would not include it in his tax return?

A. That assumption isn't possible on stocks over a period of that many years.

Q. I see. In other words, you don't think that that would be possible?

A. No.

Q. In any event, did you make a personal investigation with the Cities Service Company to determine whether that stock was still held by the taxpayer or whether it had been sold?

A. No, I never made any investigation.

Q. You just assumed for your purposes that the taxpayer still had it and included it on Exhibits 224 and 225?

A. Not completely. I asked Mr. Weinstock about it and he asked Mrs. Banks about it and they found that they had no records of it ever being sold.

Q. Did they have any records of it being on hand, Mr. Kleven?

A. No, they had no records.

Q. Now, Mr. Kleven, directing your attention to Item 31, "Insull Utilities", shown on Exhibit 224 as of December 31, 1936, as having a value of $3,497.40. Would you tell me how you determined the value of that stock?

A. Yes, I would. I believe the affidavit stated that stock was of no value, but it was subsequently sold in about 1938 or '39 and a cost of some $7,000.00 was taken on the return, but the examining officer from our department checked that return and he found the cost basis of that stock to be as shown above. I also checked that with the findings of the agent for the year ending 1933 and that showed that half of

the cost had been declared worthless back in 1932 of the original purchase.

Q. So you again took somebody else's conclusions in making up Exhibits 224 and 225?

A. The affidavit showed no value—

Q. I don't think that answers my question, Mr. Kleven.

A. What was the question?

Mr. Graff: May it be read, Your Honor.

(The question was read.)

A. I wouldn't exactly call them conclusions. They had some basis of fact on which they made out these reports.

Q. On that point, you did not rely on the affidavit, Government's Exhibit 33?

A. Not as to the value of that stock. As to the existence of it, I did.

Q. Now, in making up a net worth statement, Mr. Kleven, —in taking a stock, do you take the value as of the time you make up the statement or do you use the amount of the cost of that stock initially?

A. Please repeat that. The questions are awfully long.

The Court: You may read the question, Mr. Reporter.

(The question was read.)

A. In making a net worth statement, we use the cost basis of the stock.

Q. (By Mr. Graff.) So in appraising or determining the stocks and the values to be ascribed to them as of December 31, 1936, you would use the cost value of those stocks, would you not?

A. Well, in this particular case if that was declared half worthless by the Bureau, I would have to follow the Bureau ruling.

Q. Well, would you take, then, for your beginning net worth the cost of the stocks initially as of December 31, 1936?

A. I would take the cost basis adjusted by the worthlessness of one-half of the stock.

Q. Yes. So that you wouldn't feel yourself bound by any affidavit which the taxpayer may have made six months before or after?

A. In a couple of instances where the taxpayer used apparently market valuations, I attempted to find the actual cost basis of the assets that he had shown in his affidavit.

Q. So that the value that you took for Insull Utilities was not the value in the affidavit, Exhibit 33?

A. That is right. He had no value for it.

Q. So you discarded the affidavit as far as that was concerned?

A. I gave him the benefit of the cost basis.

Q. Well, I mean, you didn't use the affidavit, Exhibit 33?

A. Just as to the existence of it.

Q. Yes, but not as to the amount to be entered?

A. That is right.

Q. Now, I direct your attention to Item 37, "Flour City Body Corporation."

Q. (By Mr. Graff.) Now, I believe when you testified with respect to Item 37, you called attention to Exhibits 146 and 147?

A. Yes, sir.

Q. Now, directing your attention to Exhibit 146—

A. And Exhibit 33.

Q. (Continuing.) —will you point out first what there is in Exhibit 146 that fixes the value of that stock as of $4,000.00 on December 31, 1936?

A. There is nothing in this book that fixes the value of the stock.

Q. Well, I meant, where the figure of $4,000.00 was arrived at?

A. That was arrived at from his affidavit, dated July 2, 1937.

Q. And what is the par value of the stock in the Flour City Body Corporation?

A. The par value is $100.00.

Q. And in arriving at the figure of $4,000.00 for Item 37, Flour City Body Corporation, how many shares of stock did you take into consideration?

A. All that the taxpayer owned.

Q. How many shares of stock?

A. Well, I would have to add them up.

Q. Would you add them up, please?

A. It appears that they owned 200 shares.

Q. And at $100.00 a share, that would be how much?

A. If you used par value, it would give you a $20,000.00 par value.

Q. I see.

A. We were considering cost here.

Q. Have you in any of the figures which you have submitted here in connection with stocks used the par value rather than the cost basis?

A. I would say that I have.

Q. Did you in connection with Item 37 investigate personally to find out what the cost was?

A. I did, but it is of no consequence in this case because the cost remains constant from 1936 through 1947.

Q. And so you could have used the par value so far as you were concerned and it wouldn't have made any difference?

A. It wouldn't have made any difference if we had used $10,000.00, $5,000.00, or $1,000.00.

Q. I see. So you decided that you would not use the market value, or the par value in this case, in the case of Item 37?

A. I used the one that was most logical to use, which was the one that the man had in his affidavit. It was the least argumentative to use.

Q. So you used the affidavit when you felt that that was the convenient thing to use, is that correct?

A. I used it when it made a logical explanation.

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Q. Well, did you, Mr. Kleven, make any personal investigation to find out whether all the statements in the affidavit were true?

A. So far as possible.

Q. Yes, And did you find it to be true?

A. I would say that as a whole that it was.

Q. Now I direct your attention to Item 40, "Wheel Service", showing that as of December 31, 1936 you had a figure of $4,500.00. Was that the cost value, was that the par value, or what value was it?

A. That is the value shown in the taxpayer's affidavit.

Q. And it was also included, was it not, in the taxpayer's return for the year 1940, which showed that it had a different value?

A. Yes, that is true.

Q. That is a different cost value?

A. It showed a different figure for a cost value.

Q. And so you decided which one of the two would suit your purposes best?

A. I used the cost which was apparently more closer to the date of actual acquisition, which was the affidavit.

The Court: Whose affidavit?

The Witness: Mr. Banks' affidavit.

Q. (By Mr. Graff.) What personal investigation did you make to find out the cost basis of the stock in Wheel Service, identified as Item 40?

A. An officer of Wheel Service was in this court room who said that he had no books or records available for this corporation.

Q. Was that the extent of your personal investigation as to Wheel Service?

A. That and the information I have already given you.

Q. I see. That was the extent of it?

A. Yes.

Q. You never contacted the officials of Wheel Service prior to the time that that man was here and testified in the court room?

A. I never did. Mr. McKusick may have.

Q. I am asking what you did personally, Mr. Kleven.

A. That is correct.

Q. And in Government's Exhibit 4, the cost basis is shown as what?

A. The stocks are not identified on the return. There are two sales here but they are not identified by name. Which ones do you identify them?

Q. I think the second one we have already referred to as being the stock of the Old Peoria Company, which was acquired on August 1, 1935.

A. Well, the other one shows the cost or other basis of $1,700.00. Then it showed under line six "expense of sale and cost of improvements subsequent to acquisition on March 1, 1913." It shows $10,377.78.

Q. What was the cost basis then of that stock, Mr. Kleven, according to Government's Exhibit 4?

A. Well, according to the taxpayer's records or figures there, you would add those two that I read off.

Q. What figure do you arrive at?

A. I would have to add it.

Q. Well, you didn't make any personal investigation into it at all?

A. No.

Q. You just took the figure and put it on Exhibits 224 and 225 at a basis of $4,500.00?

A. That is correct.

Q. Now, Mr. Kleven, if you had taken the figures as disclosed by Government's Exhibit 4, wouldn't it have made a substantial difference in your computations with respect to this item?

A. It may have reduced the beginning net worth—

Mr. Landrum: Go ahead and finish your answer.

Mr. Lord: What would that mean?

Mr. Graff: Just a moment—

A. Well, that would have increased his income.

Q. (By Mr. Graff.) So that it would have increased his beginning net worth or would have reduced it?

A. It would have reduced it.

Q. It would have reduced it—in what way, Mr. Kleven?

A. It says the cost there was $1,700.00 and I have given him $4,500.00,—purchase price.

Q. Doesn't the return also say "Subsequent costs of $10,377.78"?

A. It does, but it doesn't give any dates for those expenditures.

Q. I see. In other words, you could have checked it but you chose to ignore it?

A. I could have checked it?—I had nothing to check it with.

Q. Well, you made no investigation insofar as the facts were concerned in Government's Exhibit 4 regarding the stock in Wheel Service?

A. No, I think I made sufficient and diligent investigation.

Q. The $4,500.00 figure that you have for Item 40, Wheel Service, was not obtained from Government's Exhibit 4?

A. Will you repeat that?

(The question was read.)

A. That is apparent.

Q. Now, I direct your attention to Item 42, "Casablanca", and I think that you stated on your direct examination that you relied upon Exhibits 70 and 71, and the testimony of Mr. Weinstock, is that correct?

A. That is correct.

Q. Now, Mr. Kleven, when you testified with respect to this transaction on direct examination, did you use memorandums which had been prepared by you?

A. When I what?

Mr. Graff: May the reporter read it, please.

(The question was read.)

A. I don't recall.

Q. (By Mr. Graff.) We called attention to the fact this morning, did we not, Mr. Kleven, that when you were testifying you were using memoranda which had been prepared by you?

A. In going through the lines?

Q. Yes. A. Yes, I did.

Q. May I have your memorandum that you used in connection with Item 42, Casablanca?

A. (Witness produces document.)

Mr. Graff: May we just have a moment, Your Honor, to examine this page?

The Court: Yes.

Q. (By Mr. Graff.) Now, your memorandum indicates—

Mr. Landrum: Now, if the Court please, I didn't make any objection when he went and took the witness' memorandum away from him—

Mr. Graff: Just a moment.

Mr. Landrum: (Continuing.)—but I don't think he is entitled to that. This witness has used that to refresh his recollection. Now, if he is going to pick up all these memoranda, we will be here a long time, if Your Honor please, and I don't think counsel is entitled to take that memorandum and cross-examine him from it.

The Court: (To Mr. Graff.) You may use the memorandum.

Q. (By Mr. Graff.) Now, the memorandum that you used in connection with your testimony concerning Item 42 indicates that you used a liquidation statement prepared by Leonard Weinstock, is that correct?

A. In the investigation we discovered such a statement, which indicated a 52 per cent valuation for the largest stockholder.

Q. Now, does not the memoranda prepared by you refer to a liquidation statement prepared by Leonard Weinstock?

A. Yes, it does.

Q. And did you rely upon that liquidation statement in determining the amount of $7,800.00 which you entered for Item 42 as of December 31, 1943?

A. As to percentage, I did.

Q. And when you testified, did you not also testify that you used Exhibits 70 and 71?

A. Yes, I did.

Q. And in Exhibits 70 and 71 it is indicated that there were 90 shares of stock which were owned by Tom Banks, isn't that correct?

A. Yes.

Q. And it indicated that there were a total of 180 shares outstanding?

A. That is right.

Q. So that he owned 50 per cent of the outstanding stock of Casablanca, Inc., isn't that correct?

A. That is correct.

Q. And yet you used 52 per cent?

A. Yes, I did.

Q. And relied on the liquidation statement prepared by Mr. Weinstock?

A. Yes, sir.

Q. Did you make any personal investigation of this matter other than the examination of Mr. Weinstock's liquidation statement?

A. I did not examine it. Mr. McKusick examined it.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 29, 1952. Appearances are as has been heretofore noted.

Q. According to my notes, Mr. Kleven, when we recessed last evening we were talking about Item 42, Casablanca, where you have the figure of $7800.00 as of the close of '43, '44, '45, '46 and '47. Do you recall that?

A. Yes, I do.

Q. And you indicated that you obtained that information from the testimony of Mr. Weinstock, in part, is that correct?

A. Yes, I obtained the acknowledgment from him that $15,000.00 was the total capital investment in Casablanca.

Q. So you regarded the figure of $7800.00 as the interest that this taxpayer had in the Casablanca for each one of those years, '43 to '47, inclusive, is that right?

A. Yes; may I explain that?

Q. Well, you regarded it that way—

The Court: You may.

The Witness: As you previously recall, this chart was prepared on Friday night and Mr. Weinstock testified on Saturday and we fully expected him to put in the evidence of 52 per cent—and he did not present that information on Saturday, although the $7800.00 is the correct figure. Your Honor, could I go down to the chart and show what effect that has?

The Court: Yes.

(The witness goes to the chart.)

The Witness: Whether this figure was $7500.00 or $7800.00, makes no difference in this chart because that figure remains constant all the way through. The only time that this would have any effect whatsoever in this case is if this figure was increased in 1945, '46 or '47. It has no bearing on the current case for the income for '45, '46 or '47.

Q. (By Mr. Graff) Or if it was decreased? A. Yes.

Q. Then you would have to change the figures on the chart?

A. Pardon?

Q. Then you would have to change the figures on the chart if it had decreased?

A. Under what conditions?

Q. If the figure had decreased.

A. If the investment had decreased, it would have to be changed, but according to the testimony of Mr. Weinstock, that corporation did not dissolve and the investment remained stationary.

Q. Now, are you talking about the legal dissolution of the corporation or the distribution of its assets?

A. The liquidation of the corporation, according to Mr. Weinstock, was not made.

Q. He said legal dissolution, didn't he?

A. I don't recall his exact words.

Q. But you took Mr. Weinstock's statement into consideration for the purpose of arriving at that figure of $7800.00 that you have for those years on Exhibit 225?

A. I took that into consideration.

Q. But you do not remember what Mr. Weinstock said?

A. I do not remember his words verbatim.

Q. Well, you do not appear to remember the effect of it. You just got through telling us that you did not know what he said, isn't that right?

A. I said I do not recall his words verbatim.

Q. Now, in connection with item 42, the Casablanca, would you turn to Exhibit 224 and have before you item 25?

A. (Witness complies.)

Q. Now, I hand you Government's Exhibit 215, and may I have the memorandum which you used in testifying with respect to Exhibit 224, item No. 25?

A. Yes, you may.

Q. Now, would you please examine Exhibit 215 and tell me whether the words "The Daily Mail" appear on that check?

A. The words "Daily Mail" do not appear on this check, but—

Q. Just a moment—

Mr. Landrum: (Interposing) Just a moment, let him go ahead and finish it.

Mr. Graff: I submit he has answered the question I asked him.

The Witness: May I explain that?

The Court: He does not have to stop with what he said if there is something more to make the data on that exhibit clear. (To the witness) You may continue your answer. We want all the testimony that is competent and relevant and material to the issues in this case. Proceed.

The Witness: Mr. Weinstock prepared a statement which he presented to us during the investigation, which indicated "Len Welsh—The Mail" and it also indicated on this statement that this check was drawn on October 31, 1947, as shown by this check. This statement that he prepared also showed that on October 30th, that he had received a $5,000.00 deposit in currency and that the following day this check was drawn, and during the testimony of Mr. Weinstock he indicated that Len Welsh operated "The Mail" and that this presumably was used for a loan or investment in The Mail.

Mr. Graff: Now, if the Court please, I move that that portion of the answer that has just been given by the witness be stricken as based upon hearsay and not responsive to the question.

The Court: The motion is denied.

Q. (By Mr. Graff) Now, you have on Exhibit 224 the item of $5,000.00 as receivable as of December 31, 1947?

A. That is correct.

Q. Now, if the $5,000.00 represented by Government's Exhibit 215 was a gift, it would not belong as a receivable on Government's Exhibit 224?

A. It would not be a receivable, but it would be an additional item of non-taxable deductions, which would increase his living expenses by $5,000.00, and that would have the same result as if it was a receivable.

Q. Mr. Kleven, I did not ask you what the result would be,—I simply asked you, if it was a gift it would not belong on Exhibit 224 as a receivable, isn't that correct?

A. That is correct.

Q. Now, you have no information whatsoever that it was not a gift, do you?

A. Well, according to Mr. Weinstock's testimony, it wasn't stated as a gift.

Q. What was there in Mr. Weinstock's testimony that indicated that this was not a gift?

A. He stated that this was drawn out of his trustee account for the benefit of Mr. Banks for Len Welsh, and Mr. Len Welsh did not appear to be an individual who would receive a gift from the taxpayer of this amount for not receiving some benefit for it.

Q. You just assumed, Mr. Kleven, that Mr. Welsh was not the kind of a person that somebody would give a gift to in that amount, is that correct?

A. Not for some reason.

Q. I beg your pardon?

A. Would not be giving it to him as a gift without any reason.

Q. I mean, that is your feeling on the matter, is that correct?

A. That is correct.

Q. Now, did you personally make an investigation to find Mr. Welsh?

A. I did not. That was done by Mr. McKusick.

Q. And you know that he made no investigation to find him either—at least he was unsuccessful?

A. I know that.

Mr. Lord: Which part of that question did you answer, Mr. Kleven, when you said "I know that"?

The Witness: I know that Mr. McKusick was unsuccessful in finding Mr. Welsh.

Mr. Lord: Well, now, the first part of that question, what is your answer to that, "You know that Mr. McKusick did not make a search for him?" What is your answer to that?

Mr. Graff: Just a moment. I submit this is cross-examination.

The Court: Well, you may answer that question. It was a double question like asking a man "If he had quit beating his wife."

Mr. Graff: Well, if the question is deemed to be improper, Your Honor, I will withdraw it.

The Court: (To the witness) You may answer the first part of the question.

The Witness: I know that Mr. McKusick made a search for him.

The Court: Very well, that answers the entire question.

Q. (By Mr. Graff) Now, did you take the $5,000.00 check, Government's Exhibit 215, into consideration in determining item 42 of Government's Exhibits 224 and 225?

A. No, I did not.

Q. And did you as a part of your investigation with respect to Government's Exhibit 215 find out when Mr. Weinstock got the funds which were represented by Government's Exhibit 225?

A. Yes, Mr. Weinstock furnished us a typewritten analysis of his trustee account in which he showed that this $5,000.00 in currency came to him the day before this check was drawn and indicated that it came from Tom Banks.

Q. And didn't that liquidation sheet that Weinstock showed you show other amounts also paid out to the taxpayer?

A. That particular analysis sheet showed receipts from Mr. Banks which were paid out for income tax purposes.

Q. Didn't the liquidation sheet that you referred to also show amounts paid out to Tom Banks by Leonard Weinstock?

A. This one that I am referring to did not, that I recall.

Q. Didn't you see the check of Len Weinstock payable to Tom Banks out of that account?

A. This account that I saw was not a liquidation statement. It was an analysis of his trustee account, not a liquidation statement.

Q. I see. Well, how many statements did you see from Mr. Weinstock, Mr. Kleven?

A. In the investigation I saw two of them.

Q. When you testified with reference to the Daily Mail or item 25, Daily Mail,—did you have in mind the liquidation statement?

A. You mean on Exhibit 215?

Q. That is right.

A. No, I do not have reference to the liquidation statement.

Q. Did you have in mind Mr. Weinstock's testimony in connection with that?

A. I think he testified that it came from a liquidation statement, but he testified erroneously.

Q. Oh, I see. In other words, your position is that he testified differently, but you figure that that was erroneous, and, therefore, you took your own impression of it, is that correct?

A. I am taking it from the facts as found.

Q. Didn't you come into court here and tell us that you made Exhibits 224 and 225 up from the exhibits in this case and the testimony that you heard in this court room?

A. That is correct, I did make it up from the information that I have obtained in court.

Q. And when it suited your purpose you discarded a certain amount of the testimony, is that correct, and took your own conclusions?

A. I am basing this on the facts that are correct, sir.

Q. Just answer my question.

A. I do not know if it was my conclusions or absolutely based on fact.

Q. (By Mr. Graff) Was it based on the exhibits and the evidence in this case?

A. Yes, it was based on Exhibit 215, check No. 109.

Q. And it was not based on evidence because you discarded certain evidence?

A. The testimony to the effect that this check was not repaid meant it was an asset as of December 31, 1947.

Q. But you discarded Mr. Weinstock's testimony, isn't that correct?

A. To what extent?

Q. In coming to the conclusion that that exhibit 215 in that amount of $5,000.00 for the Daily Mail should be listed as a receivable on Exhibits 224 and 225?

A. No, that is based upon the evidence in the court.

Q. (By Mr. Graff) Item No. 47, "National Plastics",—how did you arrive at the amount of $6,250.00 as of December 31, 1944?

A. This is going to require a detailed explanation and I would like to have Exhibits No. 11, No. 32 and 70 and 71.

(Exhibits handed to the witness by the Clerk.)

A. (Continuing) According to Exhibit 11, the taxpayer's tax return for 1947, he indicates a capital sale listed under "Partnership, Banks, Cary, Shepard, and Bortz,—cost $8,125.00; sale price $12,500.00; long-term gain, $4,375.00."

The cost of that stock is shown in this return as $8,125.00. Now, in Exhibit 32, which is a partnership return for Banks, Cary, Shepard and Bortz, for the year of 1947—this return lists acquisition dates of stock, Midwest Music, National Sound, and National Plastics, and for the years 1944, 1945, and 1946, there is a listing of about fifteen different acquisitions of stock. The numbers of shares are listed under each of these acquisitions, but the costs are not, and also the investment by each of the individual partners of Banks, Cary, Shepard and Bortz is not listed for any one of these particular dates. At the bottom of this sheet it just shows the total

investment. It does not say from whom or what year that was acquired. During the investigation we asked for the books and records of this partnership and the only record that was available was a sheet similar to this one in the partnership return, which gave no details as to dates of acquisition or costs of the individual shares. Back in 1947 the Intelligence Unit requested a special agent in New York City to make an investigation on this stock. He contacted—

Mr. Hoffmann: (Interposing) —Just a moment, if the Court please.

The Court: Yes, do not tell what he said to you. That would be hearsay.

Mr. Graff: This witness has testified, Your Honor, that he got these figures from the testimony and exhibits. Now, he is talking about some agent in New York,—obviously improper.

The Court: Very well, he is not going to give any improper testimony in this case, if the Court can prevent it. Just leave out any hearsay that may have come to you. Proceed with your answer if you are able to do so from there.

A. (Continuing) May I go down to the chart again?

The Court: Yes.

A. From this evidence included on this partnership return which shows acquisition dates in '44, '45, and '46, we refer to that as being accumulated one-third each approximately in 1944, '45 and '46, and that yould mean two-thirds of that income would be in these years. But we have given the taxpayer the benefit of the doubt in this case and only charged him with $1875.00 in '45, and set this up, which is the first year, and this is important in this prosecution, and we have set up the largest portion in 1944, which is not effective in this case.

Q. (By Mr. Graff) Is there anything in evidence, Mr. Kleven, that shows that that figure of $8,125.00 should not be the figure as of December 31, 1944? You can answer, I think, one way or the other.

A. Yes, the return shows acquisitions,—the partnership return shows acquisition of this stock in '44, '45, and '46.

Q. Does it show the taxpayer's name in connection with those acquisitions at that time?

A. It does not show any distribution to any individual nor does it show the cost on any one of the dates.

Q. Therefore, it is your conclusion that the amount should be such. You cannot base it and justify it by an exhibit in evidence?

A. The conclusion would be reached from the four partners' acquisition dates in each of the three years.

Q. That is your conclusion, is it not, Mr. Kleven?

A. That is correct. If there was a fairer way of distributing that, I would be very glad to know.

Q. (By Mr. Graff) Now, with respect to Item 61, which is "4400 East Lake Street", you testified in connection with that transaction that there were some forty acres of land in Anoka County that were part of that transaction, isn't that correct?

A. That was testified to.

Q. Isn't it a fact, Mr. Kleven, that you did not include the value of this Anoka County land on the chart on Exhibit 224 or 225 at any place?

A. May I go down to the chart?

The Court: Yes, you may point it out.

(The witness stands by chart.)

Q. (By Mr. Graff) May I amend the question: Prior to the acquisition of that Lake Street property?

A. The date of acquisition of that little piece of property that you are discussing would have no effect on this line because this is the same all the way across,—no increase in the years of prosecution.

Q. Mr. Kleven, my question was very simple: Are those 40 acres of land in Anoka Township listed on Exhibits 224 and 225 before the acquisition of 4400 East Lake Street?

A. No, they are not on it.

(Witness returns to the stand.)

Q. The first time that item 65, "Hungry Jack Lodge" appears on Exhibit 225 is as of December 31, 1941, is that right?

A. Yes.

Q. The investigation revealed that the taxpayer had that property prior to that time?

A. I do not believe so. My understanding if it was that first date on which the taxpayer had a lease for that land and the permit to use that land was in 1939, and that is also a similar asset which is the same all the way through, the whole period, and it would make no difference in this prosecution case.

Q. If your understanding was that the property was acquired in 1939, is it shown on Exhibits 224 and 225 as an asset as of the close of the year 1939 or the close of the year 1940?

A. It is shown as at the end of 1941, which would also include the prior years that you are discussing.

Q. You do not show it as of 1939, do you?

A. '39 is not included on the chart, as previously explained.

Redirect Examination

By Mr. Landrum:

Q. Mr. Kleven, in connection with his cross-examination of you, counsel has asked you with relation to the line involving Casablanca, has he not?

A. Yes.

Q. He has asked you with relation to the line involving "Cities Service", has he not?

A. Yes.

Q. He has asked you with relation to the line involving "Flour City Body", has he not?

A. Yes.

Q. (By Mr. Landrum) He has asked you with relation to the line involving the "Blue Goose Resort", has he not?

A. I do not recall that, Mr. Landrum.

Q. Well, all right. He has asked you with relation to the line involving "4400 East Lake Street", has he not?

A. Yes, he has.

Q. He has asked you with relation to the line involving "Hungry Jack Lodge", has he not?

A. Yes, sir.

Q. State whether or not the figures on that chart with relation to all of those lines carry the same figure all the way through?

A. Yes, they do.

Q. Now, will you be good enough, just to clear this matter once and for all, to step over here with me to this chart and explain to this jury your statement to the effect that insofar as this prosecution is concerned, that that makes no difference. Now, explain it very carefully.

Mr. Hoffmann: Now, if the Court please, I do not like to play with words, but I do not understand the District Attorney's statement "insofar as this prosecution is concerned."

Mr. Landrum: That is what the witness said.

Mr. Hoffmann: Just a moment. If the Court please. I submit that is not properly a part of any question. I have no objection to the substance of the question, but the wording of it, I think, is improper.

The Court: Well, I suppose he means by that question whether a change in those figures would change the ultimate result so far as the calculation of the tax is concerned in this case. That is my understanding of the meaning of that question.

Mr. Landrum: That is exactly it, Your Honor.

The Court: Well, now, you may answer that question. You may tell why there would not be any change so far as the calculation of the tax is concerned.

The Witness: There would be no change in the calculation of income or tax for the years 1945, 1946 or 1947, for any of those lines mentioned because these assests have not increased the net worth for any of those years.

Q. (By Mr. Landrum) That is what we are concerned with, the increase in net worth from year to year, are we not?

Mr. Hoffmann: Just a moment, if the Court please. This is a Government witness. We submit that the District Attorney remember that and ask questions that are properly direct or redirect questions, and that the District Attorney not testify.

Mr. Landrum: Yes, Your Honor.

The Court: Very well, just proceed with the examination of the witness.

Q. (By Mr. Landrum) Now, Mr. Kleven, counsel on cross-examination asked you, did he not, to name the exhibits which led you to hold that Mr. Banks had no cash on hand in 1936,—did he not?

A. Yes, he did.

Q. Now, will you please tell us what exhibits you used in arriving at that conclusion and what those exhibits showed?

Mr. Hoffmann: If the Court please, we object that this is repetitious. This is a matter already inquired into by the Government on direct.

The Court: I am not sure that it has been covered on direct. You may answer.

A. I used Government's Exhibit No. 33 and Government's Exhibits 70 and 71. Government's Exhibit 33, which

was used by the taxpayer in settling a tax liability in 1937, listed "No cash," and that was used as the basis for a settlement with the United States Government. And in Government's Exhibit 70 Mr. Banks was directly asked—

"Question 1: How much cash did Mr. Banks have on hand July 2, 1937?"

And his answer was completely omitted. And under Question B: "How much cash did Rita Banks have on hand July 2, 1937?"—the answer was completely omitted. He was also asked, "How much cash in the possession of Thomas W. and/or Rita L. Banks as of December 31, 1947?"—in Question No. 20, and his answer was completely omitted.

Mr. Landrum: If Your Honor please, we feel very probably that this may be the last witness which will be presented to the Court at this time by the Government. If Your Honor will recall, in the beginning of this matter there were certain motions presented to the Court and before we rest, we would like to present to Your Honor certain evidence in connection with one of those motions for the consideration of the Court: We feel it is a matter for the Court alone and we would like to present that now, if we might.

The Court: (To the jury) Gentlemen of the jury, you may retire to the jury room and await the call of the Bailiff.

(Whereupon the jury retired from the court room.)

The Court: You may proceed, counsel.

Mr. Landrum: Your Honor will recall that in Chambers prior to the time we began the introduction of testimony in this case, one of the motions which was presented to Your Honor was for dismissal upon the ground and for the reason that the action, insofar as it involved the year 1945, was outlawed in that the statute of limitations had

run against it, and at that time counsel said that that matter would be further deferred until the evidence was adduced. The situation, as I view it now, is that they have had one witness on this witness stand, Mr. Weinstock, who has testified that he prepared the income tax return for this defendant for the year 1945. He was shown it and he was shown the date upon that exhibit, which I believe was January 11, 1946. The indictment in this case was returned on January 14, 1952. That being in evidence here by virtue of the testimony of Mr. Weinstock that he put it in the mail on the same day that he dated it, and while, of course, we do not concede that the placing in the mail of an income tax return would start the Statute to running, yet in order that this matter may be entirely clear, we ask the Court to permit us to present testimony from the Court's own records on that question; and in that connection, if Your Honor please, we ask the Court to take judicial notice of its own files and records, and within it own files the Court will find a complaint filed with Mr. Eckley, United States Commissioner, on the 10th day of January, 1952, and a warrant, which was duly issued pursuant to that Complaint, upon which there has been no return made by the United States Marshal. However, if Your Honor please, in order that the record may fully show that situation, may I ask Your Honor to look in the file and, if you find such instruments, to let me have them. It is my purpose to put them in evidence in this case.

Mr. Landrum: At this time, if the Court please, the Government offers in evidence Government's Exhibits 228 and 229, for identification by the Clerk, as being the actual records of this Court.

Mr. Hoffmann: (To Mr. Landrum) Do we understand that your offer is made of these exhibits on the basis of their being part of the jury's consideration?

Mr. Landrum: No, sir.

Mr. Hoffmann: Solely for the purpose now of the Court's determination of the motion?

Mr. Landrum: That is agreeable.

Mr. Hoffmann: I am sorry, Your Honor. I should have said this to the Court. As I understand it then, Your Honor, the Government's offer of the proposed exhibits is not on the basis of these exhibits becoming a part of the record as exhibits for consideration by the jury, but they are offered by the Government for the purpose of their being submitted to the Court in the Court's determination of the pending motion.

The Court: That is correct. That is the reason why the jury was excused and that this proceeding might take place out of the hearing of the jury.

Mr. Hoffmann: Yes. I was mindful of that, Your Honor, but I merely wanted the marking of the exhibits, so far as the record is concerned, to show the purpose of their being marked as exhibits.

The Court: What are the exhibits now?

(Exhibits handed to the Court.)

WILLIAM H. ECKLEY called as a witness on behalf of the United States, after being first duly sworn, testified as follows:

Direct Examination

My name is William H. Eckley and in January, 1952, I was deputy clerk, United States District Court and was a United States Commissioner for the District of Minnesota. As such United States Commissioner there was filed with me a complaint relating to one Thomas Banks. In connection with my duties as United States Commis-

sioner, I keep a docket and I have with me the entries pertaining to that particular action. They are in the regular criminal docket of the Court following the case. After a matter is terminated they are returned into court and are placed into it. Exhibit 230 is the Commissioner's transcript or docket of the proceedings in criminal cases before the United States Commissioner. (Exhibit 230 is offered and received in evidence.)

Cross Examination

The entries on Exhibit 230 were made on January 10th as reflected on the sheet. The warrant was not served and there is no return by the Marshal attached to the warrant.

(The following proceedings were had in open court:)

Mr. Landrum: If the Court please, the Government rests.

The Court: Mr. Graff.

Mr. Graff: If the Court please, there are certain matters at this time we wish to take up with the Court and they will have to be taken up out of the hearing of the jury. I assume they will take some time, Your Honor.

The Court: Gentlemen of the jury, I think you may remain seated. I anticipate that the matters that will be presented to the Court will take a very short time. Court will then reconvene and we will proceed.

I will hear counsel in Chambers. Those in the court room will keep your seats, or retire, of course, if you desire.

(The following proceedings were in the Court's chambers:)

The Court: I will hear your motions.

Mr. Hoffmann: If the Court please, at this time the defendant moves to strike from the record and to order out

of the record as exhibits certain government exhibits heretofore offered and received. The defendant now moves to exclude or strike out as an exhibit in this case Government's Exhibit 1, the 1937 return of the defendant; Exhibit 2, the 1938 return of the defendant; Ex. 3, the 1939 return of the defendant; Exhibit 4, the 1940 return of the defendant; Exhibit 5, the 1941 return of the defendant;—may the record show when I use the word "return" I am talking about income tax return,—Exhibit 6, the 1942 return of the defendant; Exhibit 7, the 1943 return of the defendant; and Exhibit 8, the 1944 return of the defendant;—for the reasons and on the grounds heretofore stated as objections to all of the exhibits, and on the further reason and for the further ground now that the Government has by its withdrawal of Exhibits 12, 13, 14, and 15, demonstrated the immateriality and irrelevancy of Exhibit 1 to 8, inclusive.

The defendant now moves to strike, on all the grounds heretofore stated and upon the present ground, that the materiality and relevancy are not established, the following exhibits: Exhibit 16, being the 1942 tax return of Rita Banks; Exhibit 17, being the 1943 return of Rita Banks; Exhibit 18, being the 1944 return of Rita Banks; Exhibit 19, being the 1945 return of Rita Banks; Exhibit 20, being the 1948 return of Rita Banks; Exhibit 21, being the 1947 return of Rita Banks.

At this time the defense moves, on all the grounds taken as objections to their receipt at the time the exhibits were offered, that Exhibit 26 of the Government be stricken and ordered out as part of the record in this case,—Exhibit 26 being the 1946 return of Rita Banks and Harry Shepard.

On the same grounds heretofore stated as objections to its receipt, the defendant moves at this time that Exhibit 27 of the Government, being the tax return of Rita Banks and Harry Shepard bearing upon the year 1947, be stricken from the record in this case.

At this time, Your Honor, the defendant moves to strike from the record, on all the grounds heretofore stated and upon the further ground that the testimony of the Government itself demonstrates its falsity, Government's Exhibit 33.

At this time, Your Honor, the defendant moves to strike from the record and to exclude as part of the record Government's Exhibits 70 and 71, upon the grounds heretofore stated into the record as objections to their receipt and upon the further ground that the evidence adduced by and in behalf of the Government's case does not now establish their relevancy and materiality.

The Court: Those are the questions and answers?

Mr. Hoffmann: Yes, sir.

At this time, Your Honor, the defense moves to strike from the record and to order out as an exhibit in this case Government's Exhibit 80, being the ledger sheets of the bank account at the First National Bank of Anoka, on all the grounds heretofore stated as objections to its receipt.

At this time, Your Honor, the defense move to strike from the record and order out as part of the record in this case Government's Exhibits 95, 96, 97, and 98, all of which, Your Honor, bear upon the ownership of certain Government Bonds by Rita Banks and/or Tom Banks, for all of the reasons heretofore stated as objections to the receipt of said exhibits.

At this time, Your Honor, the defense moves to strike as part of the record in this case and to remove as one of the exhibits in this case, Government's Exhibit 218, bearing upon the partnership of Banks and Shepard, on all the grounds objected to at the time of its offer.

At this time, Your Honor, the defendant moves to strike from the record and to remove as one of the exhibits of

record in this case Government's Exhibit 222 on all the grounds stated at the time as objections to its receipt, and on the particular ground and further ground at this time that the testimony of the witness was part of whose testimony this exhibit was received,—that it is now demonstrated that the same is not the best evidence and that the necessary foundation for the failure to produce the first and primary evidence was not adduced.

At this time, Your Honor, the defendant moves to strike from the record and remove from the record as an exhibit in this case, Government's Exhibit 221, on all the grounds heretofore stated in the record as objections to the receipt of the exhibit and on the particular and further ground that it is now demonstrated that the same is not primary evidence, but pretends to be, as by the testimony of Mr. McKusick—witness for the Government—was testified, his interpretation or analysis of certain records that were not here produced, and it is claimed by the defendant that the receipt of this exhibit, its use and testimony concerning it, prejudicial and greatly prejudicial to the rights of the defendant because it permitted the Government witness to use his own preparation, which, according to his own testimony, was in error and was not reflective of any books here received in evidence. We want the record itself with respect to this motion as to Exhibit 221 to be clear that we still contend the necessary foundation for the production and receipt of secondary evidence was not established.

At this time, Your Honor, the defendant moves to strike from the record and to remove from the record as exhibits, Government's Exhibits 224 and 225, for the reasons and on the grounds stated as objections at the time they were offered and received, and on the further ground that it is now demonstrated by the testimony of the witness Mr. Kleven in behalf of the Government's case, that the following represents the basis of his computations or pre-

paration: All of the testimony in the case, his interpretation of the testimony in the case, his acceptance of certain testimony in the case, his rejection of certain testimony in the case,—as he, the witness, determined to accept or reject any or such testimony,—upon all of the exhibits in the case, upon the conclusions he formed, and upon, may the record show, the conclusions of his associates—and may the record show it is our contention that his testimony did not even disclose the identity of the said associates—and from other information.

We also move to strike Exhibits 224 and 225 on all the grounds stated in chambers as objections to their offer and receipt, and upon the particular and further ground that the receipt by the Court of such exhibits could have but one effect upon the jury, and that was to inflame and impassion the jury.

Mr. Graff: At this time, if the Court please, the defendant respectfully moves the Court to dismiss the three counts of the indictment returned against this defendant on the ground and for the reason that the evidence so far adduced, both testamentary and documentary, fail to prove that the defendant violated the section of the statute specified as 26, United States Code, Section 145 (B).

We submit, Your Honor, this motion on several grounds: First of all, the motion is made for an acquittal under Rule 29 of the Criminal Rules of Federal Procedure. The testimony in this case, Your Honor, has utterly failed to meet the degree of proof required to make out a violation of 145 (B), which statute is a felony and which requires that there be proof, before the case can be submitted to the jury, that the defendant willfully and knowingly attempted to defeat and evade a large part of his tax due for each of the three years, '45, '46, and '47. We submit that the evidence which has been adduced in this case falls far short

of the degree of proof necessary to make out a case under this statute.

The evidence in this case, if the Court please, has been circumstantial, and while we have no quarrel with the circumstantial evidence rule, as this Court very well knows, before a conviction can be warranted upon circumstantial evidence, all the facts and evidence must not only be consistent with the guilt of the accused, but they must at the same time be inconsistent with any rational theory of his innocence. We submit that, on the basis of the evidence in this case, to submit this case to the jury for alleged violations of Section 145 (B), of 26 United States Code, would permit this jury to speculate and not have any verdict which they might return based upon evidence.

We should like to point out to the Court in connection with this motion for an acquittal that if the testimony in this case establishes anything, it only arises to probably establish a violation of 145 (A). It might also conceivably establish, sufficiently to go to the jury, a violation of 3614 of the Internal Revenue Code. However, the defendant has not been indicted under those particular sections. He has been indicted under 145 (B), and we respectfully submit that the evidence in this case falls far short of the degree of proof necessary to make out a case upon which a jury could reasonably base any verdict returned.

The Court: Do counsel for the Government desire to state their position?

Mr. Landrum: Well, I do not know that there is anything that I should say. I am thoroughly convinced that Your Honor is fully familiar with the law and it would not be necessary for me to cite any law to Your Honor. Insofar as those exhibits are concerned, of course, we hold that they are perfectly competent; and insofar as the motion to dismiss is concerned, it is elemental that a man

must intend his acts, and there is plenty of law on this question of wilfulness, so that there isn't anything that I feel the Government should say in response, Your Honor.

Mr. Graff: Your Honor, I meant to include as a part of my motion,—and I did not want to interrupt Mr. Landrum. I also wish to point out as part of our motion for acquittal, that in our opinion the Government has failed to establish a satisfactory starting point for the so-called net worth case, and, having so failed, they have not met and cannot meet the circumstantial evidence rule which would require the evidence to be consistent with guilt and inconsistent in every respect with innocence.

The Court: Well, there are some questions that come to my mind pertaining to this case, but I think there is no occasion for me to go into them at this time. I do feel that the situation is such and the evidence in this case is such that the case should be submitted to this jury and let them pass on the facts. Consequently, the motions are overruled and an exception is allowed.

(Whereupon the following proceedings were had in open court:)

Mr. Graff: If the Court please.

The Court: Mr. Graff.

Mr. Graff: The Government now having rested, the defendant rests.

The Court: Gentlemen of the Jury, you have just heard that both parties rest. That terminates the testimony in this case. You may retire to the jury room, or to your hotel and await further instructions.

(Whereupon the jury retired.)

Do you have something further?

Mr. Graff: Yes, Your Honor. I have very short motions to make, Your Honor, and I think I could make them right here.

The Court: Very well, you may proceed.

Mr. Graff: If the Court please, at this time the defense renews all the motions which were made at the end of the Government's case, with the same force and effect as if they were fully repeated here.

The Court: The motions are overruled.

The following requested instructions were submitted to the Court on May 29, 1952.

(Caption of Action)

DEFENDANT'S REQUESTED INSTRUCTIONS

The defendant respectfully requests the Court to give the jury in the above-entitled action the requested instructions following.

Dated this 29th day of May, 1952.

JOHN W. GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
Attorneys for Defendant

REQUESTED INSTRUCTION NO. 1

For proof of its case, the government relies upon circumstantial evidence. Circumstantial evidence consists of facts proved from which the jury may infer by process of reasoning certain ultimate facts. A conviction may be had upon circumstantial evidence, but to warrant a conviction on such evidence the proven facts must not only be consistent with the hypothesis of guilt and point surely and solely in the

direction of guilt, and must clearly and satisfactorily exclude every other reasonable hypothesis except that of guilt.

REQUESTED INSTRUCTION NO. 2

To warrant a conviction upon circumstantial evidence, the facts proven must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence. It is not sufficient that the facts coincide and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis and must exclude the hypothesis of innocence.

REQUESTED INSTRUCTION NO. 3

The jury is hereby instructed that the defendant in this case is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt and if you have a reasonable doubt of his guilt, you must acquit him.

REQUESTED INSTRUCTION NO. 4

The jury is instructed that in criminal cases guilt must be established beyond a reasonable doubt and the burden of establishing such guilt rests upon the government. The law does not require of the defendant that he prove himself innocent, but the law requires the government to prove the defendant guilty in the manner and form as charged in the indictment beyond a reasonable doubt and unless they have done so, the jury should acquit.

REQUESTED INSTRUCTION NO. 5

The defendant is presumed to be innocent until his guilt is proved by competent evidence which is produced against him, and this presumption of innocence remains with him throughout the trial and applies to a consideration of each and every one essential element going to make up the offense as charged.

REQUESTED INSTRUCTION NO. 6

The burden devolves upon the government that presents this charge of meeting the presumption of innocence and overcoming it by competent legal proof and the degree of proof which the law establishes as the standard is that his guilt must be shown beyond a reasonable doubt. The defendant cannot, therefore, be convicted of the offense charged in this indictment unless and until each and every element of the offense has been established by legal competent evidence that satisfies you beyond a reasonable doubt.

REQUESTED INSTRUCTION NO. 7

A reasonable doubt may arise from the evidence or it may arise from the lack of evidence.

REQUESTED INSTRUCTION NO. 8

You are the sole judges of the facts and you are also the sole judges of the credibility of the witnesses. You are not to accept the testimony of witnesses simply because it is sworn to and follow it blindly wherever it may lead you. The law anticipates that you take all of this testimony, examine it and scrutinize it in order that you may determine where the truth lies.

REQUESTED INSTRUCTION NO. 9

If you find that during this trial any witness has willfully testified falsely regarding any material matter, then you are at liberty to disregard his entire testimony except insofar as it may be corroborated by other credible testimony.

REQUESTED INSTRUCTION NO. 10

The burden of proof as I have already informed you rests upon the government and in determining whether it has sustained the burden of proof, you should take into consideration the conduct of the witness upon the witness stand; the manner in which they have given their testimony; the candor

or lack of candor; their frankness or lack of frankness; the reasonableness or unreasonableness of their statements; the opportunity or lack of opportunity of knowing that about which they testified.

REQUESTED INSTRUCTION NO. 11

In this case the government relies on a claimed increase in the defendant's net worth in the years 1945, 1946 and 1947 to prove claimed unreported income during said years. The government's case must fail if the claimed net worth of the defendant at the starting point of the periods in question is not correct and has not been established beyond a reasonable doubt. A correct starting point must include all of the defendant's assets at that time as well as all of his liabilities. It is also incumbent upon the government to exclude any reasonable probability that the increase in net worth is attributable to capital assets or accumulations by the taxpayer in periods prior to the starting point of the net worth period in question.

In addition to establishing a correct starting point, it is incumbent upon the government to prove beyond a reasonable doubt the defendant's net worth for each year from the starting point up to and including the year 1947.

REQUESTED INSTRUCTION NO. 12

Where a specific intention is required to make an act an offense such as in the charge against the defendant, the doing of the act does not raise a presumption that it was done with that specific intent. The intent must be established from the facts and circumstances established by satisfactory evidence during the trial of the case.

REQUESTED INSTRUCTION NO. 13

The defendant is charged with having willfully and knowingly attempted to defeat and evade the payment of a substantial portion of his income tax as set forth in the indict-

ment. Before you can find a willful and knowing attempt to defeat and evade a substantial portion of his income tax, it is necessary that you find that he made some affirmative, willful attempt or attempts to accomplish such evasion and defeat.

REQUESTED INSTRUCTION NO. 14

The jury is instructed that there is no provision of law prohibiting a person from transacting his business by use of currency instead of bank checks, and neither is there any provision of law that requires any person to carry on his business or any transaction through the use of bank checks or banks.

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell on May 30, 1952. Appearances are as has been heretofore noted.

The Court: Gentlemen of the jury, we are steadily making progress—sometimes I think very slowly, but surely, I will say that to you.

Counsel may proceed with the argument of this case.

ARGUMENT

By Mr. Lord

Mr. Lord: Judge Bell, and gentlemen of the jury: The evidence in this case is in and the job remains for counsel to explain to you their respective theories in this case. Now, what you are going to be called upon to determine I believe has previously been explained to you. It is whether or not Thomas W. Banks willfully and knowingly filed a false and fraudulent income tax return by understating the amount of his income. How has the Government gone about trying to prove what he has done? They have gone about doing it by a method in which they were required to proceed because of the nature in which Mr. Banks handled his affairs. We

have used the so-called "net worth" system. Now, Mr. Banks never showed any personal books. The agents were never able to locate the books of that middleman of all these enterprises, Thomas Banks.

You have seen in evidence here books of many business ventures,—apparently on their face well kept by competent accountants. You have heard Mr. Weinstock testify, and you have heard witness after witness testify 'I know nothing about these books,—Mr. Weinstock kept the books. Mr. Brancheau kept the records of the little enterprises which he participated in.'

Now, there is another reason why we have had to use the net worth system here and that is obvious from reading the income tax returns signed by this defendant. In the year 1945, on a statement in his income tax return showing the sources of income, Mr. Banks has $15,422.47, "Wagering" —net gains. He has a little figure that will appear here with amazing regularity, "Miscellaneous fees and commissions, $2,000.00."

You will recall that when some particular item of income we found hadn't been reported, the witness—and I have forgotten just what witness it was—said, "Oh, there is a $2,000.00 figure in there that will cover that."

Now, it is not possible to figure just how many miscellaneous items will fit into a $2,000.00 figure.

In the year 1946, Mr. Banks reported $23,000.00 as the balance of winnings in wagering. He reported miscellaneous income of $2,000.00. No source is given as to where this income came from,—no source of the miscellaneous income. With $23,000.00 and $2,000.00, approximately $25,000.00 of a total of $31,000.00 came from gambling and miscellaneous sources.

Much the same applies for the year '47. In the year '45, as I stated before, the income of $15,000.00, plus $2,000.00, or approximately $17,000.00 is out of a total of $22,000.00.

Now, the Government has proceeded to find out what this man really earned and we did it by adding up everything he owned and taking away from it everything that he owed anyone. Well, of course, to that figure we have added what it cost him to live. Now, ordinarily, as to a person's living —say a man earns $5,000.00 a year, he lives up about $4,500.00 and maybe he saves $500.00. Well, you can't say that because he only has $500.00 at the end of the year that that is all he earned. No, he earned what it cost him to live. On top of that he earned what he saved, and then if he paid out some income taxes, that goes on top and makes his earnings for the year the total of all of those figures, and that is what we mean when we say an increase in net worth for a year.

A man is worth one figure at the beginning of the year. He is worth on top of that what he has lived up, what he has used up in living, what he has paid in Federal income taxes, and what he saved. The difference is his income for the year under the net worth system.

Now, the Government doesn't propose that the net worth system is an exact, precise, penny for pennyway of measuring a man's income, but it is the most satisfactory way of arriving at a man's income under the type of circumstances which you see here where we don't have a better place to look. We are forced to go around and come in the back door.

Now, I think that you have seen what happened here. I could probably explain it better by stepping over to the chart here and talk to you in terms of years. Now, 1944 is really the base year. That is really the year where we start out, with a solid figure here made after about eight or ten years of research and of analysis of this man's income.

Now, you are going to hear a lot of talk about what happened over here in 1936 and whether a little extra money

came in here and disappeared, or what might have happened to it, but the year to keep your eyes on is the year 1944, and any of these figures that start over in here before '36 and run the same all the way across, for our purposes you can disregard them because they neither increase or decrease the amount of this man's net worth.

Now, let's see, where did the Government find the sources of their information? Let's start where they started investigating. They started investigating way over in here (indicating right side of Exhibit) and they were able to go back as we would now go back two or three years and get a pretty good picture of this man's financial activities, so that they could see this increase in net worth. Then to make this solid, to make it so nobody is going to question and say, 'Oh, I had accumulated funds over in here (indicating), which I now have invested and you see that in the way of an increase in net worth.' — they said, 'We will go back here to a point where we can find this man just didn't have any funds and then we will start in and see what the picture looks like.'

So they found an affidavit which this defendant had filed with the Federal Government, expecting the Federal Government to rely on it and to forgive a certain portion of an indebtedness, — signed under oath. His assets are listed. There is no mention there of cash. There is no mention there of anyone owing him any money from prior years. He didn't say in 1937, "John Jones owes me so much money that I hope I will get some day." — he didn't say a word about anything of that kind.

He listed his assets. Later in the investigation the agents wanted to be sure that they were right, be sure that they were fair with this man. "How much cash did Mr. Banks have on hand July 2, 1937?" Answer: (No answer.)

"How much cash did Rita Banks have on hand July 2, 1937?" (No answer.)

Even assuming, — yes, even assuming that he had some cash on hand in fairly substantial amounts, in a moment I will show you on that chart where we think it must have gone, and it is the Government's contention that the net worth starting point in this case, the point that is important as far as accuracy is concerned, is 1944.

Now, what kind of evidence did the Government use in this case? Let's just take a brief look at it: Bank records, records of stockholders, U. S. Government bonds redeemed, that are here in evidence, — a couple of inches thick of cancelled certified Government Bonds. Line 10, "Rubin Shetsky," — the man's own admission to the tune of $5,000.00. "H. G. Lee" on line 11, — the man's own admission. "O'Connor note," — the records of the Probate Court in Hennepin County for $3,000.00. "Quality Drug" — he answered that and admitted that in the questions and answers. "T. E. Ewing," — $10,000.00 admitted in the questions and answers.

Now, you have heard counsel say, "Well, how do you know Mr. Ewing didn't pay that money back?" — Mr. Ewing didn't take the witness stand and say whether or not he still owed the money. Mr. Ewing isn't in court. The question itself gives you the answer. The questions and answers contain the answer to why that $10,000.00 is still outstanding.

The "Ring Construction Company," a reputable Minneapolis firm, came in and testified as to $2,000.00. "F. J. Wickers" came and showed the checks which represented money which he had repaid to the defendant and his wife representing loans. "Robert Schuettler," — you will remember the fellow with the broken leg who came in and testified as to $10,000.00. "Walter Halvorson," the man from Grand Marais, came and stated how he borrowed money to build or to buy a house. "Brady's Bar," — well, this is one where we didn't have the books and records made available to us. We put a transcript in where the agents had seen those books and records before.

"Pearson's News Service," — from the books and records of that company (indicating). "Blue Goose Resort, Inc." — the books and records and his own venture show what his income was.

Have we come to anything questionable there as yet? This looks like merely a problem of addition. "McCarthy's Cafe" — from the books and records, and Mr. McKusick's analysis, which counsel has seen fit to question.

Mr. McKusick made an analysis, you will recall, where he went down and he added up everything that was in Rita Bank's name and he threw everything else out and came up with a figure at the end that represented $25,000.00 as being an investment from the sale of some National Plastic shares. That $25,000.00 represented what Mr. McKusick saw on those books at the time he examined the books. Subsequent to that time, Mr. Harry Clark, or Mr. Shepard — Mr. Shepard claimed that he owned half of that $25,000.00. So the agents forgave Mr. Banks for $12,500.00 there at that point.

Let's go some more through this evidence here, through what the Government has used, and see how doubtful is this case. The Flour City Body Corporation, — you remember Mr. Toensing brought the books in. He didn't know anything about them, but the agents examined the books. This is what they found (indicating).

The Daily Mail check, which is here in evidence and about which Mr. Weinstock testified, given close to the end of that year. Counsel would like to say or infer that that check was paid back, but I think that the jury is free to draw their own conclusions as to what happened to that money.

Merchants Distilling, from the records of Jamieson and Bishop. The same for Gillette Safety Razor, Northwest Airlines, and the Mohawk Liquor Corporation — I confess I have forgotten just where that came from.

The Insull Utilities, from the taxpayer's own affidavit, on which the Government relied.

The Cities Service — there is some dispute over the amount there as to whether it was actually on that affidavit or the agent gave him credit for the actual acquisition cost. That runs all the way through. It is immaterial; it doesn't make any difference to the issues in this case.

Banks and Shepard, — we have only the agent's versions of what was on those books. The books were not produced.

Coin-A-Matic Amusement Company, — the same situation prevails. McCarthy's Cafe, — we took that right from the books. The B. & S. Company, — no books available. We had to take the agent's versions of what was on those books. We can't be frustrated by the mere fact that books are not available when we had agents who have transcribed from those books and who have told us that they have accurately written down what they saw.

Again, the Flour City Body Corporation, — from the books. Power Brake and Equipment Company, the same. The Blue Goose Resort, and Wheel Service — you can go on down here. Koolaire, — a reputable Minneapolis business man in here testifying as to his business records; and Budweiser Tavern was admitted in the man's own affidavit.

Now, let's look at this Casablanca line here (indicating). There may be a slight question as to this line, whether it should be $7,500.00 or $7,800.00. I might say that we can all read — it doesn't make a bit of difference. We are charging this man with the increase in his net worth in '45, '46, and '47. Now, it would make a little bit of difference in the increase in net worth in the year of 1943. We will see more of that later, but he is not being charged with anything that occurred in 1943.

The Anoka Farms (indicating) — it all came right off his own income tax returns. The other property came from deeds, records, — it came from public documents.

"Mortgages Payable" came from public documents and from the accou ts of lenders who brought in their books and records and pre.ented them to us here in court.

There is a significant part of this I would like to call your attention to. Notice how the Mortgage Payables go down. Doesn't this seem to indicate that over in the years '36, '41, and '42 the defendant owed more money? We say he increased his net worth, he owed less money and owned more property. You see, that pattern is quite obvious right there (indicating).

Now, the "Loans and Accounts Payable" — Harold H. Banks, the defendant's own brother, testified as to one loan. The First National Bank, Anoka, — the books and records of the Flour City Body Corporation (indicating), — all those totals have been added together showing what his wealth is. Subtract from that what he owed (indicating), and you come out with his net worth at the end of each of these years.

Now, as we have explained before, you add on the living expenses, add on the Federal income taxes paid, and now I would like to direct your attention down to the two lines, the second from the bottom and the bottom line. They are the lines which I think you gentlemen of the jury will have time to refer to again and again. Let us skip this period '36 to '41, (indicating), except to say that that represents four years where he reported — it represents '37, '38, '39, and '40, where he reported $22,000.00, where the Government's findings show that he should have reported $45,000.00.

In the year 1942 he reported $14,000.00; the Government's evidence shows that he should have reported $48,000.00.

In 1943 he reported $21,000.00; the Government says he should have reported $94,000.00. Can that be an innocent mistake — $21,000.00 against $94,000.00? Is that error or omission?

Can you just turn a thing like this over to an accountant and let him forget to report the difference between $21,000.00 and $94,000.00? Can you just sign a return, turn your back, and say that it is not wilful? I think that gets pretty hard to swallow.

In the year 1944 he reported $11,000.00; he should have reported $89,000.00. In the year '45, he reported $20,000.00; he should have reported $43,000.00. Those are large discrepancies. In the year '46, he reported $27,000.00. This is the year that the investigation began incidentally. He reported $27,000.00 and should have reported $36,000.00. In the year '47, he reported $20,000.00 and should have reported $41,000.00.

Can it be said that that was an unintentional omission?

Now, while we are on this big chart, again I want to call your attention to the first year upon which the prosecution is actually based, and that is the year 1944. You have heard the agents testify again and again that they made diligent search to find out what this man's assets and liabilities were. They had frequent contact with his attorneys and with his accountants, and those attorneys and accountants didn't see fit to make any explanation for that increase. The man was just too rich at the end of some of these years and couldn't account for it by the amount of income which he had reported.

The agents wanted to be sure that in 1944 when the man had a net worth of $231,000.00, and when in '45 he had a net worth of $270,000.00, -- they wanted to be sure that that didn't represent some savings that he might have had in one of these prior years (indicating), that it didn't represent a loan by a friend who loaned him money to invest in these assets which they found. They wanted to be sure that there was no inheritance. If the man had inherited money and put it in there, why, of course, it wouldn't be income. If someone had given him thirty or forty thousand

dollars and he invested it in a building and the agents came and added up his net worth and found he was worth $40,000.00 more, it would be simple for him to say to the agents, "There is my friend John Jones, — he just gave me $40,000.00 last year." — and that would have ended it. No such explanation has been made. No explanation has been made up until this moment. The men — the associates in business, the people who have shared in these ventures, — they have not been called to explain this.

Now, the agents made a search to ascertain whether or not the money was from gifts, from inheritance, or bequest, whether or not it represented prior accumulated savings, and at that point they said, "Well, now, it is just possible this man might have had some prior accumulated savings. Let's look for a point where he didn't have any prior accumulated savings and we know by his own statement just what he is worth." So then they went from '44 back to '36, and that is the only significance that 1936 has in this case.

Now, let's assume that in 1936 he did have some cash. Let's just say that he had five or ten or fifteen or twenty thousand dollars in 1936 hidden away in a safety deposit box. Here is $22,000.00 of increase in net worth in the next four or five years. He hasn't explained where that came from. Couldn't that be the money which, if he had it, he would have saved?

What of this $34,000.00 (indicating)? That will soak up a lot of money that a man might have salted away, or the $73,000.00 in this year (indicating), or the $78,000.00 in 1944 (indicating).

No, to be led to believe that an accumulation of savings over in here in '36 is represented by what we charge as being income here (indicating), you must take this route: You must say he saved all this money, — all these increases in net worth for which he paid no tax. They don't count; they go out the window some way. But then in 1945 he

reached way down in the sock and he pulled out $23,000.00 and in this year he pulled out $9,000.00, and in this year he pulled out $20,000.00, — and there is no explanation for these large figures which you see here on the bottom line of this chart in the years previous to prosecution.

All it would take is an explanation. That explanation hasn't been given. Now, I think it has been explained, and I beg your pardon if I repeat, — this case has been complex to me in some respects, but it boils down to just a couple of simple little propositions. Rita Banks got too rich for what she had reported in income too. She had too much money in her hands to be accounted for by what she had reported.

Tom Banks answered in the questions and answers which were submitted to him, through Mr. O'Gordon, in his return — let me read you the whole question; you have heard it before: "The investigation has disclosed certain assets and liabilities in the name of Rita Lee Banks, others in the name of Thomas W. Banks, and still others in joint tenancy. Does the acquisition of joint tenancy assets above represent income by Thomas Banks or by both he and Rita Banks?" — Thomas Banks was the answer. That is the answer he gave. In other words, he says, "All right, she has got too much money on hand. We have some property in joint tenancy, but I put my money in there." — so if he spent the money, it was his money he spent. We say it was his money; it was income. That is the only conclusion you can reach.

Now, the next question: "Does Thomas Banks consider Rita Banks individually liable for cumulative net worth as determined from assets in her name in excess of the funds available from her reported income, or does he hold himself liable for her excess in cumulative net worth?"

In other words, what the agent says here, — Rita is much richer than she should be according to what income she

has reported. Now, who is responsible for this money in the middle here over her income? The answer: "Rita Banks' assets acquired from Thomas Banks."

That is why, gentlemen, as you look through the exhibits you will see many exhibits with the name Rita Banks on them, — many exhibits with the name Tom Banks on them. You will see records of partnership returns where Rita Banks is in partnership with some of these fellows.

Now, has the Government had any help here? Has the jury had any help from the various people who have been associated with this defendant? Have they come to explain to you the various ventures in which they were interested? Mr. Archie Cary was associated, I believe the records will show, in some partnership venture. Mr. Bortz, Banks and Cary were in the National Plastics venture. Harry Clark hasn't been in court. He is interested in Brady's Bar, the 10th Street Realty, and Koolaire, Inc. Has he been here to explain what his interests are or to refute the figures which the Government has given here? No.

Harry Shepard was interested in this $25,000.00 loan to McCarthy's and in other assets here. National Plastics, — he was interested in the partnership of Banks and Shepard,— I believe that one he was interested in it with Rita Banks. But has Harry come here to explain that the Government is wrong in the figures we have established here?

Coin-A-Matic Amusement Company, — is Harry Clark here to tell us we were wrong in charging the defendant with what we did with reference to his investment in the Coin-A-Matic Amusement Company?

The B. & S. Company, — has Harry Shepard come here to tell us anything about that, or has Tom Ewing? Mr. Ewing hasn't seen fit to come and explain what happened to that $10,000.00 loan which I just made reference to.

You would think that Mr. Weinstock would have some explanation for these matters. I don't see Mr. Weinstock here explaining them. They are not offering much help in that regard.

Now, I think that the figures have abundantly shown that there is a tremendous increase in net worth here in this case, — an increase from $18,000.00 to $322,000.00, and that in addition to that there has been some money spent for other things. Now, can it be said that a man can have an increase in that amount, and as you see by comparing the two lines just above the bottom line, it appears that he has reported amounts varying from one-half to approximately one-fourth or fifth of what he has earned. Can a man close his eyes and say, "I didn't know what the picture was."? — or, "The Government hasn't proven that I knew this."

Now, gentlemen, look at those bottom two lines, — the bottom three lines. It leads to only one conclusion. You just can't get that rich and have that much income and sign a return for so much less and not be doing it wilfully and knowingly.

What other evidence do we have of wilfulness or knowingness? You have heard the agents testify as to the way transactions were carried on. There were no bank accounts to speak of. The usual banking methods were neglected. Checks were taken from one party and handed to a third party, — never went through a bank. Sell one asset, obtain another. When the Federal Government Bonds were cashed in the First National Bank, this defendant took the checks, cashier's checks, — cashed in the bonds, took the cashier's checks, and went over and bought Northwest Airlines stock and other stocks in a stock brokerage outfit. The agents have made a diligent search and have uncovered those transactions and have submitted their results to you here in the form of a chart which shows the activity.

I am just going to walk over to that chart once more and show you one more thing which I have already talked of and which I just want you to keep in mind, because you are going to hear a lot of talk about a lot of things that don't mean anything in this net worth case. The years we are concerned with, or the question we are concerned with is how much was he worth right there (indicating), and how much richer was he right there (indicating the years '44 and '45). That is what we are concerned with. It doesn't make any difference if an agent made a computation or a calculation over here (indicating 1936). The things that disappear, disappear. They don't enter into our computations. You see, that is because when a man sells something during the year, he doesn't have it on hand at the end of the year. If he sold a big house at the beginning of the year he wouldn't have it on hand, but through our computation and through search it would either turn up in a bank account, in another investment, in cash on hand or in some other place, but you don't count a building that is sold in the middle of the year. That is what happens here in the years '36, '41 and '42. Some of those items disappeared, but it is submitted that the reason for going way back here to '36, way back in here (indicating), is not to find dollar for dollar what he has. It is to find a pattern and to show that at this time (indicating 1936) he was relatively a poor man, and that the increases in net worth for these subsequent years where he didn't report $34,000.00, $73,000.00 and $78,000.00 — they would soak up, or as the agent said on the stand, absorb any little extra cash or any little extra loans that might have been outstanding as of this time. So that when you get up into '44 and an agent had started working in '36 and made diligent search in '43 and '44, — you have an almost ironclad picture of that man's financial activities. So when you hear conversation about years preceding this, I submit that you remember what I am now suggesting that the important years are the last four years.

Look at those lines (indicating), gentlemen. It is up to you to decide. I don't think that you will have any difficulty in arriving at the decision that Mr. Banks failed to report a substantial portion of his income. I believe that is what the Court will advise you is required. The Government is not required to prove every dollar which they allege. I think you will not find a substantial discrepancy between what we have alleged we could prove and what we were actually able to prove. I think you have observed the conduct and the demeanor of the witnesses. Counsel will perhaps make great moment of the fact that we haven't proven every dollar, or were many dollars short of what we have alleged in our indictment, but the question that we submit to you here is not — Has the Government been able to prove every dollar it alleged? The question you are asked to decide is — Did the man fail to report a substantial portion of his income, and did he do it wilfully and intentionally?

The tremendous increase,—a study of the pattern,—can lead you to but one conclusion, gentlemen. Thank you.

ARGUMENT

By Mr. Landrum

Mr. Landrum: May it please the Court, and gentlemen of this jury: May I not say to you in the beginning now what I said to you a week ago last Monday, that when this case is all through and done, your greatest recompense will be a consciousness of a duty performed, and for myself and those whom I have had the honor and the privilege to be associated with, I desire to express to you our most sincere thanks and gratitude for the attention which you have given to a case which may be somewhat disinteresting; and to counsel I express my personal appreciation of your many courtesies in the trial of this case.

I want to say to you, members of this jury, it shall be my earnest endeavor to say no unkind word of any man who has appeared in this case or who has had any part in the conduct of it, and I want to say to you that I am very proud and very happy to have had the honor and the distinction of being connected with the Government of the United States through many, many years. I thank George McKusick and "Jerry" Kleven. I have considered myself honored to work with them, and I now to you and to them express my thanks.

As we go along, you and I, and we sit down and undertake to discuss the facts in this case, I shall be very careful, very careful, very careful, not to misquote anything. If I do, you forgive me for it because I do not intend to do it. Now, before we go any further, I want to say to you that I feel very sure that never, never, never again will you sit as jurors in a case which has terminated as this one has terminated and yet had the defendant appear before you and ask you to bring in a verdict of not guilty. Men, there has not been a single scintilla of evidence introduced from that witness stand to contradict the evidence of the Government of the United States. I repeat, there has not been a single witness for the defense placed upon that witness stand to contradict the evidence which you heard adduced by the Government of the United States. And you took an oath, and what was that oath? — to decide this case upon the evidence that you heard from that witness stand and upon the law as it would be given to you by this Court. That is the oath which you took, and I say to you the evidence of the Government stands absolutely uncontroverted and uncontradicted in this case.

Now, I shall address myself for just a moment to an effort to in my small way—and I want to say to you that I have no pleasure, have no pleasure in prosecuting any man, nor is it any pleasure to us to come into this court room and undertake to carry out the oath that we took as officers

of the Government of the United States. Sometimes as we go into cases of this kind, we become disheartened, discouraged, low, feeling blue, because they pile it on,—they pile it on. I wonder if it is an honor to represent the Government of the United States or if it is a mark, a stigma, or something? We try, we do the best we can, and yet it seems as though we are criticised for it. But you know, as I go along, it seems as though a still small voice says to me, "Go on, go on."—that is the voice of the people, and we go on.

Mr. Hoffmann stood before you and he made a very wonderful talk, but did he discuss with you the evidence in this case? Did he? No, he talked about the Statue of Liberty, he talked about Memorial Day and things like that, and he castigated George McKusick. Men, they must try someone else in this case because they are defending the defendant. But he talked about presumption of innocence, and he can't beg of you, beg of you, beg of you any more sincerely than I can to give this defendant the presumption of innocence.

He talked about a trial by jury and he talked about reasonable doubt. Yes, yes. In connection with those matters, all I have to say to you is this: Please, please, please listen to what his Honor tells you is the law with relation to them. His Honor will tell you what is meant by the presumption of innocence. His Honor will tell you what is meant by the term "reasonable doubt", so I am going to repeat that two or three times in connection with the little talk that you and I are going to have. We are going to sit down together and talk about the evidence, but remember now, you are the sole judges of the facts, but his Honor will tell you what the law is, and with that statement I think that I shall pass on from those three arguments.

There is one thing that Mr. Hoffmann said that hurt me a little. He said that there was evidence in this case that a man by the name of "Mitch"—"dead men tell no tales"—that a man by the name of "Mitch" had paid some $19,000.00.

There is Exhibit 117 and 117-A to -Z—you remember those, members of the jury (indicating)—you can add it up yourself. There is no evidence that that was money which this defendant had outside of everything, but if there is, it isn't $19,000.00. It is $9,805.42. The total of those checks, which were made out in the year 1947, is $9,805.42. All the balance of them are after 1947, and we are not concerned with any year after 1947. So Mr. Hoffmann hurt me a little when he said to you $19,000.00, because only $9,805.42 is contained in those checks as having been paid in the year 1947.

Mr. Graff—well, I was a little amused, because Mr. Graff seemed to think from the beginning of this case that we should have brought you an exhibit with relation to the amount of money in cash that Mr. Banks had in his pocket. Now, for the life of me, I have been unable to determine what kind of an exhibit we could have brought to you to show the amount of cash Mr. Banks might have had in his pocket. We couldn't take a picture of it; we couldn't bring an exhibit in here, if he had any cash in his pocket. I don't know what he meant, but I do know this, that Mr. Banks made a sworn statement to representatives of the United States on July 2, 1937, in which he did not list any cash.

I do know this, that Mr. Banks and Mr. Weinstock and Mr. O'Gordon sat down with a list of questions, which had been submitted to them by Mr. McKusick in November, 1951—or 1950—and took three months to answer it. When they asked him how much cash he had, I know that—that is Exhibits 70 and 71—they asked him how much cash he had, and strangely, strangely, strangely, he did not tell them. Now, why? Well, I will leave it to you.

Then the statement was made here that the United States Government, through me, had come into this court first and said that Mr. Banks should have paid $42,000.00 in income taxes, which he didn't pay, and that then we reduced it to $32,000.00. Oh, men, so far as I am personally concerned,

I wish we could have reduced it to nothing. Yes, it was reduced; it was reduced in an effort to bring in here nothing except the absolute and unadulterated truth. Yes, it was reduced, and it would have been reduced right up to now if that was right and just and fair. So far as we are concerned, this defendant shall and will have a fair and a just trial. His Honor will see to that, and we will help him to do it. And then, you see, men, sometimes some of us who have had years of experience in this kind of thing are able to anticipate and are able to understand what the lawyers say, probably a good deal better than a man who hasn't. Now, Mr. Graff made a most strange argument. I will tell you what he argued for. He argued for a hung jury. And I will tell you why I say that,—because he repeatedly said, "You exercise your own individual judgment." That is what he argued for. His Honor will tell you what you should do when you get in the jury room.

Now, let's go along; let's talk about the evidence in this case. And I desire to say to you that I am going to try to follow some notes as well as I can, because I don't want to say anything wrong. All that the Government has to prove in this case is that the defendant attempted to evade a substantial portion of his income taxes for the three years charged in this indictment. All that the Government has to do is to prove that he attempted to evade a substantial portion of his income taxes for three years. Now, I think His Honor will tell you that that is the law. Let me just go with you a moment to what I characterize as the "tall pines in the forest of evidence" in this case.

One, there is no evidence in this case that you heard from that witness stand to contradict the evidence introduced by the Government. Therefore, that is the only evidence which you can consider. Now, what I say to you is not evidence; what these other lawyers have said to you is not evidence. Evidence is what you heard under oath from that stand.

POOR COPY

Now, they haven't put a single witness on there to contradict a single word of it. So it stands uncontradicted.

Now, men, with that set of circumstances,—how, how, how on earth, under your oath, can you do other than bring in a verdict of guilty on each count?

Cash, cash, cash—cash has floated around in this case until I have almost "cashed in." $22,805.00 in cash money was paid by Mr. Banks to Mr. Clark for stock in Koolaire, and that is shown by the deposit slip of Koolaire—$22,805.00 in cash. Mr. Banks loaned the man who came in here with a broken leg $10,000.00 in cash. Wickers paid Mrs. Banks—now, I don't know whether the loan had come from Mr. Banks or whether Mrs. Banks had made it—but Wickers testified that he paid to Mrs. Banks four thousand, six hundred and some odd dollars in cash.

I am going now to the tall pines, the things that stick out like a sore thumb and that you can't miss. There is another one; there is the analysis of the testimony in this case. What does it show? Thomas W. Banks reported $20,170.00 as his net income in 1945, when according to the uncontradicted evidence in this case, he should have reported $43,690.11. Men, if you made $43,000.00, you would know it, and if your income tax return only showed $20,000.00, you would know that that income tax return was wrong.

There it is, (indicating)—in 1947 he reported $20,609.29, when according to the Government's figures he should have reported $41,453.07. Men, if you made $41,453.07, and Mr. Weinstock—I choke when I think of him—made out a return for only $20,000.00, you would know he was wrong. You are 21 years old, and you can read and write and sign your name, and his Honor is going to tell you when you do that, you are presumed to know what you are signing. He will tell you that that is the law, so that is another thing.

Now, let's go on to some more things here that interest me. Thomas Banks and Mrs. Banks are man and wife. I don't know—I am sure she is a fine woman. My mother is. Thomas Banks and Rita Banks are one and the same insofar as this case is concerned, because Thomas Banks swore that Rita Banks' assets were acquired from Thomas Banks, and that is in Exhibit 33.

Mr. Hoffmann: If the Court please, the defendant desires to show that counsel's then statement is an improperly prejudicial one.

The Court: The record will show what the statement was.

Mr. Landrum: (To the Clerk) Will you give me Exhibit 33?

(Exhibit handed to Mr. Landrum.)

Mr. Landrum: Yes, I am wrong; I apologize. It is in that other exhibit. I got the exhibit number wrong.

Mr. Hoffmann: And the other exhibit, may the Court please, is not a sworn statement as counsel suggested to the jury.

Mr. Landrum: That is correct, Your Honor.

The Court: Very well, keep within the record.

Mr. Landrum: Yes, sir.

What actually happened, and I apologize for it—in the question and answer statement, which was not a sworn statement, Thomas Banks in response to the question said this: "Rita Banks' assets acquired from Thomas Banks."

That wasn't a sworn statement. That was the answer that Mr. Banks and Mr. Weinstock and Mr. O'Gordon got together and gave to Mr. McKusick. Now, Rita Banks' income, and it is on one of these charts, was very, very, very small each year. The highest income that she reported was about $1,300.00 for the highest year. Some of them were down

POOR COPY

$100.00, or $200.00 or $300.00. You will see it there (Indicating). Thomas Banks in his own returns took credit for the taxes which were paid on the home, which I believe was in joint tenancy. Thomas Banks included in his own returns rents on the Beard Avenue place, which was in Mrs. Banks' name. Thomas Banks took the capital loss on stocks which were in Mrs. Banks' name. Thomas Banks took all the losses or gains on the Anoka farm, which was in joint tenancy.

F. J. Wickers handed Mrs. Banks $4,680.00 in payment of a loan which I understood him to say he had gotten from Thomas Banks. I don't think there is the least question but what they were commingled,—I am sure that you are clear on that.

Now, where did Thomas Banks' income come from? You take those income tax returns and you will see that a very large, very large, very large percentage of it came from what is designated there as "gaming". Now, that means cash money coming in and going out.

I think that this question of intent may be considerably important. Now, you listen to the Court's charge with relation to intent. I think he will say to you that intent is a state of mind. You can't look into a man's mind to see what he went on. A man is presumed to intend the reasonable consequences of his acts. Now, this defendant kept no personal books of account; he handled his affairs so as to avoid the usual records; he had very, very few bank accounts. None of this is contradicated, and before I get through, I want to give you what I consider the classic of this case, and that is Mr. McKusick's description of how he handled his money.

Then they say that there is no proof of wilfulness. Again I say, you listen to the Court's charge in that regard, please. If you made $40,000.00 and the income tax return that you sent in only showed $20,000.00, wouldn't you know it? A man who is able to write and sign his name does it wilfully.

BLEED THROUGH

Now, he must have known that these income tax returns were incorrect. Why?—because in 1947, according to the testimony, according to the testimony, and according to all of the testimony in this case, in round figures his income was $43,000.00 and he only reported $20,000.00; in 1946, in round figures his income was $36,000.00, and he only reported $27,000.00; in 1947 his income was $41,000.00, and he only reported $20,000.00. I have taken that information off there and I have been as fair as I could to try to give it to you in round figures.

Now, those figures are not denied. From evidence on that witness stand, which you said that you only would take into consideration, they are not denied. There hasn't been a single witness to contradict them. The fact that this witness signed these returns is sufficient for you to find that he had knowledge of their contents. I think his Honor will tell you that is the law.

The Government of the United States does not have to prove the exact figures in this indictment. I think his Honor will tell you that is the law. As a matter of fact, if you listen to his Honor's charge, I think he will tell you that it is not necessary that the Government prove an evasion of all the tax charged. It is sufficient if any portion of the tax was attempted to be defeated and evaded as charged in that count. I think that is the law.

Now, the figures, therefore, which the Government presents here do not have to be correct to the dollar. That is true of both the starting point and of the tax. I think his Honor will tell you that. But Mr. Lord has pointed out to you the situation here which really, really, really exists, and that is that the year with which we are really concerned is 1944. That is, what did he have the year before he was charged with this offense? So 1944 is the real honest-to-goodness starting point. Then we took what he had at the end of 1944, then we took what he had at the end of 1945,

POOR COPY

and we deducted what he had at the end of 1944 from what he had at the end of 1945 and the difference must have been what he had made during that year. Then we took what he said he made and it just didn't figure out. He just had too much money.

So it is perfectly plain to me, and I hope it is to you. You take what he had at the end of '44; you take what he had at the end of '45. You deduct the '44 from the '45. The difference you get is what he must have made during that year, and when he only reported half of it, then we say that the offense here charged was complete.

Now, as to Mr. Weinstock—you know, as I lay in bed the other night, I thought of Weinstock, and I thought. "Oh, what a tangled web we weave when we practice to deceive." And Weinstock—Weinstock came on this witness stand, told you that he had appeared before the Grand Jury on the 2nd day of May, and when I was talking to him and with him, I felt that he was not being entirely fair. So you will recall that I took the record of his testimony and walked up there to him. Now, men, you saw him here. Mr. Weinstock came into this court room and did everything that he possibly could for the defense in this case and he went just as far as he possibly could and yet at the same time not admit that he was also mixed up in this thing. If he had told you that he knew that these returns weren't correct he would have been an accessory, and I want to say to you that then when he injected into this case some things,—when he injected a man who has passed away and gone to the Great beyond, a man whom he knew we could not possibly bring in here I thought again. "Dead men tell no tales."

It is Weinstock who talked to Mr. Graff. It is Weinstock who talked to Mr. Graff after he went before that Grand Jury and before he came on that witness stand—

Mr. Hoffmann: If the Court please, objection is taken to counsel's statement as an improperly prejudicial one and not based on evidence.

The Court: Gentlemen of the jury, you will remember the evidence in this case. I am not sure as to what the testimony was in regard to the statement that was made. You may proceed, counsel.

Mr. Landrum: (Continuing) Members of the jury, again I say forgive me, but my mind is very, very clear on that. You will remember what he said. Then let's go along to the man who has borne the burden, to the man who carried this on his shoulders for about six years, George McKusick. Why, why, has it come about that when a man does his duty as he has seen it as best he could, and why is it that when he comes before a jury of his peers and undertakes to explain what he did, that then they have to try him instead of the defendant?

It is an honorable thing to be employed by the Government of the United States, and I want to say to you that sometimes, sometimes some of us get a little hurt by things which are said of us. George McKusick told you that he went with the Internal Revenue Bureau in 1941. He told you that he started the investigation of this case in 1946. He told you that he and a group of agents turned over every check, every cashier's check, went into every bank in Minneapolis except one, and turned over every cashier's check and draft in there in an effort to find out what Mr. Banks' financial transactions were.

He told you that Mr. Banks had not kept any books and records. He told you that he called for cancelled checks, and here is what he said—"They gave me some bank statements and some cancelled checks. In most cases some of the checks were missing out of several of the statements." Why? Was it because those checks might have disclosed something?

POOR COPY

And Mr. McKusick said this, "The defendant had more money or assets at his disposal in each calendar year than he had reported for income tax purposes."

That statement by Mr. McKusick has not been contradicated by any evidence from that witness stand. And here is the classic: He said the defendant would buy a cashier's check with currency, use the cashier's check to buy property, sell the property, use the proceeds of the property to buy War Bonds, and cash the War Bonds to buy listed stocks, without a single entry being made in any bank account. And that is not denied.

And Mr. Kleven, another gentleman, another gentleman—yes, another Government employee—came on this witness stand. Do you know any reason why he would seek to do any wrong? Is there any reason on earth why any of us are in here? Men, we have carried this burden on our shoulders and it isn't going to be very long until we are going to transfer it to yours. Mr. Kleven came here and told you what he had done. He told you honestly and sincerely of the investigations that he had made himself. He told you of the charts that he had drawn. Yes, he did start drawing charts a long time ago. Yes, that is the way they build up, that is the way they set up a net worth case, by net worth charts. But as the evidence was adduced here, as the testimony came in, as we made further and more complete investigation, changes were made, and as I said to you a moment ago, if we knew there was another change that could be made or should be made, I would make it right now—and my compliments to you gentlemen who have the honor and the distinction of representing your Government and mine.

Gentlemen, is it necessary that you and I sit down and talk much longer about this matter? Please listen to what his Honor tells you is the law. Let me say this to you again: Never, never, never will you or I ever see a case like this one,

where the only evidence which is presented from that witness chair is the evidence of the Government of the United States and not a single witness takes that chair to deny it, or to contradict it, and yet they come in here and ask you to bring in a verdict of not guilty. You took an oath, even as I did. You said that you would decide this case upon the evidence that was heard from that witness stand and upon the law as it would be given to you by this Court,—and you will, and you will, and you will, and that verdict must be guilty on all three counts.

Now, please remember it is not necessary that the Government prove figures exactly. All that it is necessary to do is that you be convinced beyond a reasonable doubt. Now, reasonable doubt doesn't mean any imaginary doubt, his Honor will tell you. That is all.

We have done the best we could. It hasn't been any pleasure to be here; it hasn't been any pleasure to you. We have been struggling here for several days, and we have had to stay here over Memorial Day. That is too bad, but justice must be administered.

I am almost through. I wish I could read your minds. If there is anything that you are struggling with, I would try to help you but I can't see where it is. I can't see how there could be any possibility in view of the fact that there is no evidence on the other side of this case.

Shall I tell you a story? I think they went a little too far when they expect a jury to bring in a verdict of not guilty in this case.

There was a colored boy down in Oklahoma who was in the Army, and he got out of the Army and came back down to Oklahoma and he met a gentleman who had been his friend before he went in the Army. He said, "Why, hello, Rastus", he said, "how did you like the Army?"

POOR COPY

"I didn't like it, boss,—I didn't like that Army at all. I got court martialed."

His friend said, "You got court martialed? What did you get court martialed about?"

"I don't know, I don't know,—it was something about a 'furlong'."

"Well," he said, "it couldn't have been about a 'furlong'. It must have been about a 'furlough'." Furlough is a military term.

"No, sir, no sir,—it was about a 'furlong'. They said I went to 'fur' and I stayed too 'long'."

Thank you when you get all through and done, your mind and memory will ever remain green with the thought that you have done what is right, and nothing is going to haunt you,—nothing is going to haunt you. So now again I say, do your duty as you see it. Should you see fit to bring in a verdict of not guilty here, 'Gus' Landrum is not going to criticise you. The American jury system is a wonderful thing. May you do what you feel is right. May you give this defendant a fair and impartial exercise of your best judgment and bring it in without fear or favor. Let the chips fall where they may. We thank you very, very, very much.

COURT'S CHARGE TO JURY

The Court: Gentlemen of the jury:

The Government of the United States has undertaken to provide laws, legal procedure, and courts so as to protect at all times the rights and liberties of the people. A fair and impartial trial of both civil and criminal cases is essential to insure the proper administration of justice. In addition to laws providing for rights and remedies it is necessary to have and observe rules of evidence and procedure and throw

about the trial of cases every possible safeguard so as to eliminate all improper and extrinsic influences that might affect the verdict of the jury and so as to insure as far as possible an unbiased unprejudiced result. As I stated in the beginning this case should be decided on the evidence presented to the jury from the witness stand in this trial.

You have heard the evidence in this case, the arguments of counsel and their respective views and contentions. It now becomes your duty to consider all the evidence in the light of the rules of law given to you by the Court in this charge and it likewise is your duty to apply these rules of law to the facts as you find them from the evidence. It is your exclusive duty to determine the facts and not to accept any comment of the Court or counsel made during the trial insofar as the facts are concerned. It is proper for the Court to instruct on the legal principals involved and for counsel to express their views, but you, yourselves, must decide the facts except where they have been admitted during the trial. You should depend on your own memory for the evidence, draw your own conclusions and form your own opinions. In deciding this case you are performing one of the most important duties of citizenship and you should act courageously. Your verdict should not be influenced by sympathy or prejudice.

On January 14, 1952, a Grand Jury of the United States acting within and for the State of Minnesota returned an indictment against the defendant Thomas W. Banks containing three counts.

In the first count it charged that the defendant wilfully and knowingly attempted to defeat and evade a part of the income tax due and owing by him to the United States for the calendar year 1945.

In the second count it charged that the defendant wilfully and knowingly attempted to defeat and evade a part

of the income tax due and owing by him to the United States for the calendar year 1946.

In the third count it charged that the defendant wilfully and knowingly attempted to defeat and evade a part of the income tax due and owing by him to the United States for the calendar year 1947.

The defendant entered a plea of not guilty to the indictment, which is a denial of the facts alleged by the United States in the indictment and the indictment with the plea of not guilty defines the issues for your consideration and determination in this case.

The filing of the indictment is not evidence of the guilt of the defendant. It does not raise a presumption of guilt or a presumption against him. The indictment is the formal, written accusation or pleading provided by law for bringing the defendant to trial. It should be regarded in that light and in no other.

The defendant is presumed to be innocent until his guilt is proved by competent evidence which is produced against him, and this presumption of innocence remains with him throughout the trial and applies to a consideration of each of the essential elements going to make up the crimes as charged.

The burden devolves upon the Government that presents this charge of meeting the presumption of innocence and overcoming it by proof, and the degree of proof which the law establishes as the standard by which the defendant shall be tried is that his guilt must be shown beyond a reasonable doubt. The defendant cannot, therefore, be convicted of the offenses charged in this indictment unless and until each and every essential element of the crime has been established by evidence that satisfies you beyond a reasonable doubt.

When all the evidence in the case, carefully analyzed, compared and weighed by you, produces in your minds a settled conviction or belief of the defendant's guilt, such a conviction as you would be willing to act upon in matters of highest importance relating to your own affairs, when it leaves your minds in the condition that you feel an abiding conviction amounting to a moral certainty of the truth of the charge, then, in that event, you would be free from a reasonable doubt.

A reasonable doubt is not a mere whimsical or captious doubt, for anything relating to human affairs and depending upon human testimony, is open to some possible or imaginary doubt. Absolute or mathematical certainty is not required, but there must be such certainty as satisfies your reason and judgment and such that you feel conscientiously bound to act upon.

The rule which clothes every person accused of crime with a presumption of innocence and imposes upon the Government the burden of establishing his guilt beyond a reasonable doubt is not intended to aid anyone who is, in fact, guilty of a crime to escape, but it is a humane provision of the law, intended so far as human agencies can, to guard against the danger of any innocent person being unjustly punished.

This is a criminal case and is based on a statute of the United States, Title 26 U. S. C., Section 145 (b) which provides:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect and truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, which, in addition to other penalties provided by law, shall be guilty" * * * of a violation of the law.

The United States has offered evidence to show that the defendant for the year 1945 filed an income tax return in which he reported a net income of $20,170.11 and a tax due the Government in the sum of $7,675.27, whereas the defendant's net income for the year 1945 was in fact $43,690.11, on which he should have reported and paid a tax in the sum of $22,719.33. In other words, the federal income taxes the Government contends should have been paid but were not reported for the year 1945 were $15,044.06.

The United States has further offered evidence to show that the defendant for the year 1946 filed an income tax return in which he reported a net income of $27,100.99 and a tax due the Government for that year in the sum of $10,556.98, whereas the defendant's net income for 1946 was in fact $36,799.97, on which he should have reported and paid a tax in the sum of $16,386.39. In other words, the federal income taxes the Government should have been paid but were not paid for the year 1946 were $5,829.41

The United States has further offered evidence to show that the defendant for the year 1947 filed an income tax return in which he reported a net income of $20,609.29 and a tax due the Government for that year in the sum of $6,955.14, whereas the defendant's net income for the year 1947 was in fact $41,453.07 on which he should have reported and paid a tax of $19,022.69. In other words, the federal income taxes the Government contends should have been paid but were not reported for the year 1947 were $12,067.55.

The United States by this evidence has sought to prove that the defendant has wilfully attempted to defeat and evade the payment of a total tax of $32,941.02 for the three years.

If you find from the evidence in this case that the defendant wilfully and knowingly attempted to defeat and evade

a large part of his income tax due and owing by him to the United States for the calendar year 1945 as charged in the first count of the indictment, then you should find him guilty on the first count. Unless you do so find, you should return a verdict of not guilty on the first count of the indictment.

If you find from the evidence in this case that the defendant wilfully and knowingly attempted to defeat and evade a large part of his income tax due and owing by him to the United States for the calendar year 1946 as charged in the second count of the indictment, then you should find him guilty on the second count. Unless you do so find, you should return a verdict of not guilty on the second count of the indictment.

If you find from the evidence in this case that the defendant wilfully and knowingly attempted to defeat and evade a portion of his income tax due and owing by him to the United States for the calendar year 1947 as charged in the third count of the indictment, then you should find him guilty on the third count. Unless you do so find, you should return a verdict of not guilty on the third count of the indictment.

The offense with which the defendant is charged in each count of the indictment involves two principal elements.

One, there must have been a tax due under the applicable Revenue Act from the defendant.

Two, there must have been a wilful attempt by the defendant to evade or defeat such tax or the payment thereof.

The question here is whether you are convinced from all the evidence in the case of the guilt of this defendant of the offenses with which he is charged in each of the counts of the indictment. This question involves two determinations.

One, whether you are convinced from all the evidence that there was due from the defendant for each of the years 1945, 1946, and 1947 an income tax in amount greater than that reported and paid by him to the Government for that year and if you are so convinced that such is the case, then.

Two, whether you are further convinced from all the evidence that there was a wilful attempt by the defendant in each of said years to evade or defeat any part of such income tax by means of filing a false or fraudulent return for each of said years.

The gist of the offense charged in the indictment is the wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt", as used in the law involves two elements: An intent to evade or defeat the tax and some act done in furtherance of such intent. The word attempt contemplates that the defendant had knowledge and understanding that during the calendar years 1945, 1946, and 1947 he had an income in such years which was taxable, and which he was required by law to report and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar years and which he knew it was his duty to state in his returns for such years. The attempt to evade and defeat the tax must be a wilful and knowing attempt, that is to say, it must be made with the intent to keep from the Government the tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.

The presumption is that a person intends the natural consequence of his acts and the natural presumption would

be if a person consciously, knowingly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of the tax, that he intended to evade and defeat the tax.

You should know something of the provisions of the Revenue Act applicable to the years 1945, 1946, and 1947 imposing the tax. The income tax is not levied on all of the money or its equivalent received by an individual during the year. In the first place, only income is taxable. Income is the gain derived from capital, from labor or from both combined, and from the profit on the sale or conversion of capital assets and only when the conversion or the sale of the capital assets results in profits. Furthermore, the tax is not computed on the total amount of such gain derived during the year but only a part thereof determined in the manner prescribed by the revenue laws.

It is the policy of the law to tax income and not capital, and only that portion is taxed which is net income. The Revenue Act under which the indictment here is brought imposes a normal tax, so-called, on the net income of the taxpayer according to a graduated scale. The same Act imposes a surtax on net income according to a graduated scale.

Net income means the gross income computed under the Act less the deductions allowed by the Act.

Consequently, you will observe that the first step in arriving at the income of an individual on which the tax is computed is the determination of the gross income of the individual. Gross income includes gains, profits and income derived from salaries, wages, or compensations for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in profit whether real or personal, growing out of the ownership or use of or interest in such

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profits; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit or gains or profits and income derived from any source whatever.

Chapter I of the Internal Revenue Code imposes an income tax on individuals, including a normal tax as specified in Section 11 and a surtax as specified in Section 12. Hypothetical questions were put to a revenue agent on which he computed the tax which the Government claims should have been paid for each of the three years involved.

You are instructed to determine whether the individual tax liabilities for the years here involved are correct as the same is set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence.

It is not necessary that the Government prove an evasion of all of the tax as charged in the indictment. It is sufficient if any substantial portion of a tax was attempted to be defeated and evaded as charged in that count.

The owner of a business need not be an accountant or bookkeeper to be familiar with the affairs of his business. If the inability of an owner to be familiar with the books and affairs of a business could be accepted as an excuse for filing a false tax return with the Government, he could escape punishment irrespective of guilt. Of course, he could not be held liable for innocent clerical mistakes, but he must be held to know that which it is his duty to know and which he solemnly promulgated and placed in a tax return and it is for you to determine from all the evidence whether the defendant in this case had knowledge of the falsity of the returns made by him.

The duty to file an income tax return is personal, and responsibility for it cannot be delegated. It is true that

many businessmen, or men who are not familiar with making returns have their attorneys or agents prepare their returns for them, but they must sign such returns and are responsible for them. Clerical mistakes, of course, can occur. Bona fide mistakes should not be treated as false or fraudulent but no man who is able to read and write and who signs and verifies a tax return should be permitted to escape the responsibility of at least good faith and ordinary diligence as to the correctness of things which are contained in the statement which he signs and verifies whether prepared by him or by someone for him.

A man may not shut his eyes to obvious facts and say he does not know. He may not close his eyes to the observations and his knowledge of things that are obvious to him and say, "I have no knowledge of those things." He must exercise such intelligence as he has, and, if the evidence shows that he has intended to conceal tax liabilities from the Government, then, of course, he was not acting in good faith. This question of intent is a question that you must determine for yourselves from a consideration of all the evidence.

The element of intent enters into the offenses charged in the indictment and is one of the questions for you to consider and decide. That is, whether the defendant wilfully and knowingly attempted to defeat and evade a portion of his income tax due and owing by him to the United States of America for the calendar years 1945, 1946 and 1947.

It is seldom possible to prove by direct evidence of the intent actually existing in the mind of a person at a given time. The state of a person's mind generally can be determined by his acts, conduct and manifestations and in determining the question of intent in this case you should take into consideration not only the direct evidence bearing thereon but all the facts and circumstances surrounding the defendant in connection with his business affairs and

enterprises during the years mentioned. If from a consideration of all the evidence you are satisfied beyond a reasonable doubt that the intent charged existed in the mind of the defendant, then you should so find.

Although the defendant is charged herein with attempting to evade his income taxes for the years 1945, 1946 and 1947 only, the Court, nevertheless, permitted evidence of like or similar transactions by the defendant for years preceding 1945. Such evidence is to be considered by you only insofar as you may find that it bears on or relates to the intent of the defendant with respect to tax evasion if evasion or attempted evasion you find it was. In other words, such evidence was admitted for the purpose of showing the state of mind or intent of the defendant.

The defendant is not charged in the indictment with failure to keep books or records. He is charged with wilfully attempting to evade or defeat income taxes due for each of the three years which I have mentioned. His failure, if any, to keep accurate books and records has a bearing only on the intent of the taxpayer in respect to the return that was made for any given year of the three. You have a right to consider the fact that accurate records were not made though the law at that time and before that time had required that such records be kept. You have a right to take into account that the law required the defendant to keep books and records when you are finding and determining with what intent the defendant acted, and whether his return was inadequate; otherwise the section imposing the duty on the taxpayer to keep the records is not here involved. However, if you find that he failed to keep proper books and records, it may be taken into consideration in determining whether he intended to evade and defeat the tax.

If you find that a fraudulent return was filed by the defendant with intent to defeat all or a part of the tax for any

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one of the years mentioned and that this was done wilfully, the crime is complete.

Circumstantial evidence consists of facts proved from which the jury many infer by process of reasoning certain ultimate facts. A conviction may be had upon circumstantial evidence, but to warrant a conviction on such evidence the proven facts must not only be consistent with the hypothesis of guilt and point surely in the direction of guilt, and must clearly exclude every other reasonable hypothesis except that of guilt.

To warrant a conviction upon circumstantial evidence, the facts proven must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence. It is not sufficient that the facts coincide and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis and must exclude the hypothesis of innocence.

You are the sole and exclusive judges of the credibility of the witnesses and it is for you to say who should be believed and to what extent. In determining these questions, you may among other tests, observe the demeanor of the witnesses upon the stand, their candor or lack of candor, their manner of testifying, whether direct or evasive, whether shifty or straightforward, their age and experience, and the reasonableness or the unreasonableness of their story when viewed in the light of the facts in the case which are admitted or proved by uncontroverted testimony, and when viewed also in the light of your own judgment and experience in the affairs of life.

You may also consider any testimony as to inconsistent statements or admissions made by any of the witnesses upon the stand or upon other occasions. You may also take into consideration the capacity and the ability of the several witnesses to observe, to know and to remember the facts and to relate them correctly. You may also consider any

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interest which a witness has or appears to have in the outcome of the case.

If you should find that any witness in the trial has knowingly and wilfully testified falsely to any material fact in the case, you are at liberty to totally disregard the testimony of such witness except insofar as it may be corroborated by other credible evidence in the case.

You need not concern yourselves with the question of punishment if you find the defendant guilty. The law places on the Court the responsibility of performing that duty.

I have referred to the evidence in this case in a very limited way. Indeed, I have undertaken to avoid comment on the evidence and on the facts as I may view them. Counsel for the respective parties have analyzed the evidence fully. The references I have made to the evidence do not mean that I have undertaken to emphasize any of the evidence in the case or that you should omit any of the evidence from your consideration. You should undertake by consultation among yourselves to refresh each other's memory and to recall the testimony on the several elements involved in these alleged offenses. You should give to such evidence all the weight and credit to which it is entitled in your judgment.

If you believe the testimony of the Government as it has been given in the trial, undoubtedly the defendant had income not shown in his income tax returns and on which he should have paid a tax but did not. If you so find — and this is a question for you to determine — you should return a verdict of guilty. On the other hand, if you are not satisfied of the defendant's guilt beyond a reasonable doubt, you should find him not guilty.

You will have for your convenience a form of verdict, omitting the venue and caption of the case, which reads as follows:

"We, the jury in the above-entitled action, do find the defendant, Thomas W. Banks, ———— guilty as charged in the first count of the indictment herein, 1945 and ———— guilty as charged in the second count of the indictment herein, 1946, and ———— guilty as charged in the third count of the indictment herein, 1947."

If you find the defendant guilty on all three counts you may use this form. It should be dated and signed by your foreman. If you find him not guilty on all three counts, you should write the word "not" in the blank preceding the word "guilty" as it appears on three lines in this form. You may find the defendant guilty on all three counts or not guilty on all three counts. You may find him guilty on any one count and not guilty on the others, or guilty on any two counts and not guilty on the other.

Your verdict must be unanimous.

Are there any exceptions, gentlemen? The jurors may retire for a brief recess and await the call of the Bailiff.

(Whereupon, the jury retired from the court room.)

The Court: Gentlemen, have you any exceptions —

Mr. Landrum: The Government has no exceptions or suggestions, Your Honor.

Mr. Graff: May I approach the Bench, Your Honor?

The Court: You may come forward if you desire.

(Whereupon, the following proceedings were had at the Bench:)

Mr. Kyle: May the record show that at the close of the testimony the defendant submitted certain requested instructions in writing, which are a part of the files in the matter, being numbered 1 to 14, inclusive. The Court at that time ruled on the requested instructions. The defendant excepts to the refusal of the Court to give requested instructions Nos. 1, 7, 11, 12, 13 and 14.

Mr. Hoffmann: I think the record should show that this is done before the jury retires to deliberate.

The Court: And out of the hearing of the jury, of course.

Mr. Kyle: The defendant excepts to the portion of the charge which stated that it was the duty of the defendant to keep books and records, that the law required him to keep books and records, that he failed to do so and that the jury had the right to consider that in determining the question of intent.

The defendant also excepts to that portion of the charge toward the end thereof where the Court said that if they found the defendant had income on which he did not pay a tax, they should find him guilty. That portion of the charge should have stated, so the defendant contends, that if the defendant had income on which he did not pay a tax, and if the jury found from the evidence that there was a wilful intent on the part of the defendant to evade or defeat the tax, that a verdict of guilty should follow, — the mere fact that he had income on which he did not pay a tax being not sufficient to constitute the offense charged in the indictment.

The defendant also excepts to that portion of the charge embodied in Government's requested instruction VIII, in which the Court stated in substance that although the defendant was charged with attempting to evade his taxes for the years 1945, 1946, and 1947 only, that the Court had nevertheless permitted evidence of like or similar transactions by the defendant for other years. The Court stated that such evidence could be considered by the jury only insofar as the jury might find it bore upon or related to the intent of the defendant with respect to tax evasion, if evasion or attempted evasion was found. In other words, the evidence was admitted for the purpose of showing or throwing light upon the state of mind or intent of the defendant. It is our position that the jury had no right to consider any

attempted evasion of taxes for those prior years for any purpose whatsoever in this case. When the exhibit in question was received, it was not received solely on the question of intent. That is, when I say the exhibit, I mean Exhibits 224 and 225 setting forth the amount of the alleged unreported taxes for those prior years.

The defendant excepts to that portion of the charge which embodied Government's requested instruction No. XI, which was in substance that the owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business, the Court stating that it would present a somewhat startling situation if a defendant, charged by law with the duty of filing a return, could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he has sponsored. In view of the number of books and records in this case, including the books, records and returns of enterprises in which the defendant may or may not have had an interest, it is our position that that instruction should not have been given and tends to mislead the jury and prejudice the defendant.

Although the Court did give an instruction with respect to circumstantial evidence, the defendant excepts to the failure on the part of the Court to advise the jury that there was circumstantial evidence in this case and that the claims of the Government were based partly thereon.

Is there any objection to Mr. Graff taking some further exceptions?

The Court: Not at all.

Mr. Graff: The defendant takes further exception to that portion of the Court's charge where the Court stated that the United States has offered to prove that the defendant for each of the years in question filed an income tax return in which income tax return he stated his tax, and his net income to be a certain amount.

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The defendant excepts to that portion of the charge where the Court then stated, 'In other words, the defendant only declared a net income of so much and paid a tax of such amount.' The objection to the Court's charge in this respect is that the Court did not, in referring to that portion of the testimony, make clear that the ultimate decision of the fact questions involved was for the jury and the Court's charge in that respect invaded the province of the jury.

The defendant further excepts to the charge of the Court where the reference in the charge was made to the owner of a business, drawing the distinction that innocent clerical mistakes would, of course, be avoided and that a person would not be held responsible for innocent clerical mistakes, giving the impression that for any other mistakes which might be made, an offense might be made out under Section 145(b) of the Internal Revenue Code.

The defendant further excepts to that portion of the charge where the Court's charge stated that a man may not shut his eyes to obvious facts but he must exercise such intelligence as the situation warranted.

The Court: Have you any comment to make?

Mr. Landrum: If the Court please, Mr. Lord has very graciously suggested that Your Honor was possibly in error when you said that "If you find there was unreported income, you should find him guilty." Now, I don't know whether Your Honor said that or not, but if Your Honor did, possibly you would like to add to it that if such failure to report was wilful.

The Court: Well, I don't remember just what the instruction said.

Mr. Kyle: That was right down toward the end of it before you started talking about the forms of verdict.

Mr. Lord: That is right; it is the last page or two, I believe. I am not sure I heard it right.

Mr. Kyle: I made the same point here a few minutes ago on that.

The Court: You say that I told the jury that if he failed to report income, they should find him guilty, and you contend that I should have told the jury, "If he wilfully failed to report income" —

Mr. Lord: That is right, Your Honor.

The Court: I thought that is the way I said it. Well, I will make that correction. You may be seated.

Bring in the jury, Mr. Bailiff.

(Whereupon, the jury returned into the court room.)

The Court: Gentlemen of the jury, my attention has been directed to a possible error in the charge. I do not remember the exact language, but the point has been made that I instructed you that if income was received and not reported, you should find the defendant guilty for any one of the years in which the income was received. It is necessary to find that there was a wilful and knowing intention to evade and defraud the Government by failure to pay the tax. If you find that to be the situation, you should return a verdict of guilty for any one or all of the three years in question in which such a situation may be found.

The officers will come forward and take the oath.

(The officers were duly sworn.)

Gentlemen of the jury, this case is now submitted to you for your consideration and your verdict. You will retire to the jury room, select your own foreman, and in consultation together arrive at a conclusion as to what the verdict or verdicts should be in this case. You may retire with the officers.

The jury then retired to consider its verdict under the charge of the officers who were duly sworn and qualified to attend them. The jury is thereafter returned into Court, and being called and all being present and in the presence of the parties hereto, they do render their verdict herein and in the words and figures following, to-wit:

"UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS W. BANKS,

Defendant.

VERDICT

We, the Jury in the above-entitled action, do find the defendant Thomas W. Banks, guilty, as charged in the first count of the indictment herein (1945); and guilty, as charged in the second count of the indictment herein (1946); and guilty, as charged in the third count of the indictment herein (1947).

Dated: May 30, A. D. 1952.

F. P. PADDOCK, Foreman."

Whereupon, it is by the Court

ORDERED: That defendant do appear in this Court for sentence when so ordered, and said matter is referred to the Probation Officer for investigation.

FURTHER ORDERED: That the jury be excused from further service.

(Caption of Action.)

NOTICE OF MOTION

TO: Philip Neville, United States Attorney
C. U. Landrum, Special Assistant United States Attorney
Miles W. Lord, Assistant United States Attorney
221 Federal Courts Building
Saint Paul 2, Minnesota

PLEASE TAKE NOTICE, that at the Federal Courts Building, 6th and Market Streets, Saint Paul 2, Minnesota, at a Special Term of said Court to be held on June 23, 1952, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, the above-named defendant will move the Court as set forth in the attached motion.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Defendant.

(Caption of Action.)

MOTION FOR A NEW TRIAL

The defendant hereby moves the Court to grant a new trial to the defendant on one or more of the following grounds:

1. A new trial is required in the interest of justice.
2. The verdict of the jury is against the clear weight of the evidence.
3. The verdict of the jury is contrary to the evidence.
4. The verdict of the jury has resulted in a miscarriage of justice.

5. The evidence lacks that degree of persuasiveness without which there should be no conviction.

6. Variance between the indictment, the bill of particulars and the proof at the trial.

7. Denial of request for a bill of particulars.

8. Denial of request to dismiss indictment because indictment was based upon improper and insufficient evidence before the grand jury.

9. Error of law occurring at the trial in dismissing the juror, Milton W. Bauman, after he had been accepted as a juror and duly sworn as a regular juror in this case.

10. Errors of law occurring at the trial in the reception of oral testimony over objection on the part of the defendant.

11. Errors of law occurring at the trial in the reception of exhibits over objection on the part of the defendant.

12. Errors of law occurring at the trial in the refusal of the Court to strike certain testimony which was received.

13. Errors of law occurring at the trial in the refusal of the Court to withdraw exhibits or portions which had theretofore been received into evidence.

14. Errors of law occurring at the trial in the refusal of the Court to grant a judgment of acquittal at the close of the plaintiff's evidence and at the close of the evidence in the case.

15. Errors of law occurring at the trial in the refusal of the Court to give certain instructions to the jury as requested by the defendant.

16. Errors of law occurring at the trial in the giving of certain instructions to the jury and duly excepted to by the defendant before the jury retired to consider its verdict.

17. Errors of law occurring at the trial in the arguments of counsel for the plaintiff at the trial.

18. Such other events, happenings, occurrences at and during the trial which militated against the defendant having a fair trial.

Said motion will be made upon all the files and proceedings heretofore had in the above-entitled matter and upon such further affidavits, oral and documentary evidence as may be adduced at the time of hearing.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF

Attorneys for Defendant

Proceedings had in the foregoing entitled matter before the Honorable Robert C. Bell without a jury on June 23, 1952.

Appearances are as has been heretofore noted.

(Statement made by Mr. Kyle.)

(Statement made by Mr. Graff.)

(Statement made by Mr. Lord.)

The Court: I shall not undertake to extend my remarks or deliver an opinion on this matter at this time. I have been much interested in the arguments that have been presented because I have been very greatly interested in this case since it came before me the first time. I have read many of the decisions that have been cited in these arguments here today and I think I am fairly familiar with the

principles that have been laid down in the decisions of the courts and in the statements of counsel.

It is seldom a case is tried, I think, covering a period of two weeks, where there is a vast amount of evidence introduced, where many exhibits are received, without leaving the way open so that arguments may be made pro and con that the trial court has made errors in certain rulings, that counsel have made errors in remarks and in comments during the trial that are erroneous, and even reversible error.

The rules of law for the trial of cases permit the record to be made and they permit consideration of the record that has been made. They provide for appeals so that if the trial court has erred, the errors may be corrected. I have been interested in some of the issues that have been discussed here by counsel. But this case, like many others that I have tried in the last nineteen years, convinces me that it is difficult to make a perfect record in the trial of cases in receiving evidence, in excluding evidence, in instructing a jury, and in permitting comments by counsel for the government or for the defendant.

In view of this situation, I feel that this Court at this time must overrule the motion for a new trial, Mr. Clerk, and an appropriate order may be made to that effect.

Mr. Lord: I should like at this time to move for sentencing, Your Honor.

The Court: The defendant may come forward.

(The defendant appeared before the Bench.)

The Court: You were ably defended in this case by good lawyers, experienced trial lawyers. I think you had a fair trial. This Court made every effort to see that you did have a fair trial. The jury was removed from contact with the outside world as nearly as possible so that they might not be influenced either way by reading or talking to anyone from whom they might get any information. You were en-

titled to have this case decided on the evidence that was offered here in this trial. Your lawyers undertook to see that nothing except competent, material evidence was received for the jury's consideration.

This is one of the unpleasant duties that I have to perform. This Court has no unkindly feeling for you. I regret that this case came before me and that it has been in the courts. I think there is no official in the government who wants to abuse you in any way, these investigators or anyone else, but this Court has a duty to perform to the public as well as to you and that is the duty that I am confronted with at this time.

If I thought that it would make any difference, another week or two would not be so important, but I thought counsel had been informed that I would consider the motion for a new trial today and if it were overruled that sentence would be imposed. The courts have to make progress in these matters. There is much business before the Courts. I have to be in Winona yet this evening so I can appear in court tomorrow morning, and we have to eliminate some of these cases that have been tried, get rid of them, so as to be ready for the cases that are still to come. That is the reason why I have been here all afternoon without even a recess of a few minutes.

Now, I can eliminate from my consideration comments that I may have heard in the past, I can eliminate from consideration the fact that there are many tax cases in the courts of the country at this time, and there are many persons who are charged with a violation of the tax law. I am concerned with the facts as shown by the evidence in this case. Here is a tax case prosecuted by the government of the United States against you in which it appeared that—I think in the first place—forty odd thousand dollars was not reported. I think by the time the trial of the case was ended it was some $32,000,—a considerable sum of money.

That was for three years, and there had been a number of years in addition to that constituting a total period of some ten years that the government is claiming additional taxes. They claim that you intentionally and unlawfully evaded the payment of those taxes.

Well, three years were involved in this suit and the facts were submitted to a jury of good citizens, I think. I am confident of that, because the officers of the Court undertake to secure fair, unbiased, unprejudiced jurors. This Court undertook to do likewise. So there is no recourse except for this Court to impose some sort of a sentence commensurate with the facts and the law.

As punishment for the offense to which the defendant Thomas W. Banks has been convicted in this case, it is the judgment and sentence of this Court that he be and he hereby is, as a general sentence on the three counts of the indictment, committed to the Attorney General or his duly authorized agents for imprisonment in an institution of the penitentiary type for a period of three years, and to pay a fine of $10,000.00.

Persons charged and convicted of a violation of the law often are placed on parole. That situation, that provision of the law must be taken into consideration by the courts. One-third of your sentence now is one year. I am not saying that the Parole Board will parole you at the end of a year. I do not know. That is their duty. This Court has no supervision, no jurisdiction over a matter of that kind. I just wanted you to know that there is a provision of the law which will terminate your service, or that may possibly terminate your sentence, the service of your sentence, at the end of one-third of the time.

Now, is there a continuing bond in this case?

Mr. Graff: Yes, it is a continuing type of bond, Your Honor. I had no idea that sentence was going to be imposed today.

The Court: Well, I desired to avoid remanding this defendant to the Marshal.

Mr. Graff: I appreciate that, Your Honor.

The Court: That is why I am asking you that question.

Mr. Graff: May there be a stay and his bond continue for such reasonable period of time as the Court may suggest?

The Court: Mr. Clerk, is the bond here?

(Discussion off the record.)

The Court: Now, this bond may remain in force and effect until on or before the 1st day of July. If you desire a supersedeas bond, you might say so at this time.

Mr. Graff: Well, while I have not had an opportunity of conferring with associate counsel, I am sure the Court appreciates that there are some good legal questions involved and I think they present rather substantial questions which we may want to present to have reviewed. The Court said he had to go to Winona again tonight, as I understand it?

The Court: Well, that is correct, but I am here to finish the job in this case.

Mr. Graff: On the assumption that there will be an appeal, Your Honor, does the Court care to indicate whether a bond would be allowed on appeal and the amount of such bond? In that event, it is my understanding there would have to be a new bond.

The Court: A supersedeas bond may be given by this defendant because of his right to appeal and to remain at liberty during the pendency of that appeal.

Mr. Graff: Thank you, Your Honor.

The Court: That is generally done and this Court's attitude in cases of this kind. I think I have never required

a defendant to serve time in prison if he was taking an appeal, where substantial questions are involved or may be involved. So this appeal may be taken and a supersedeas bond may be given. It should be drawn with a bail bond for his liberty, and a supersedeas bond in this case. It should be a larger bond than he is now under. I think a bond drawn so as to assure him of his liberty, and the supersedeas feature, should be $35,000.00.

(Caption of Action.)

NOTICE OF APPEAL

1. *Name and Address of Appellant.*

Thomas W. Banks
3817 Drew Avenue, South
Minneapolis, Minnesota

2. *Name and Address of Appellant's Attorneys.*

Jerome Hoffmann
1220 Minnesota Building
Saint Paul 1, Minnesota

Richard E. Kyle
W-2162 First National Bank Building
Saint Paul 1, Minnesota

John W. Graff
1220 Minnesota Building
Saint Paul 1, Minnesota

Hoffmann, Donahue & Graff
1220 Minnesota Building
Saint Paul 1, Minnesota

3. *General Statement of Offense Charged.*

Willful attempt to evade and defeat income taxes due and owing by appellant to the United States for the

calendar years 1945, 1946 and 1947 in alleged violation of 26 U.S.C.A. 145(b).

4. *Concise Statement of Judgment, Date Thereof and Sentence Imposed.*

Said Judgment reads in part as follows:

"On this 23rd day of June, 1952, came the attorney for the Government, and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of attempting to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar years 1945, 1946 and 1947 as set forth in each of the three counts of the indictment in violation of Title 26, Section 145(b) U. S. Code, as charged in the indictment herein, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and that he do pay a fine of Ten Thousand ($10,000.00) Dollars."

5. *Statement as to Confinement or Bail.*

Appellant has been released on bail.

6. *Statement of Appeal by Appellant.*

I, Thomas W. Banks, the above named appellant, hereby appeals to the United States Circuit Court of Appeals

for the Eighth Circuit from the above stated judgment. Dated: June 30, 1952.

THOMAS W. BANKS, Appellant

(Caption of Action.)

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, Thomas W. Banks, as principal, and Morris Kieffer and Isadore Kieffer, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of THIRTY-FIVE THOUSAND AND NO/100 ($35,000.00) DOLLARS, to be paid to the United States of America, to which payment well and truly to be made we, and each of us, do hereby bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of June, 1952.

WHEREAS, at the April Term, 1952, of the District Court of the United States for the District of Minnesota, Third Division, in a cause pending in said Court between the United States of America, as plaintiff, and said Thomas W. Banks, as defendant, a judgment and sentence was rendered against the said Thomas W. Banks, and the said Thomas W. Banks has appealed to the United States Court of Appeals for the Eighth Circuit to reverse the judgment and sentence in the aforesaid cause, and

WHEREAS, THE CONDITIONS OF THE ABOVE OBLIGATION ARE AS FOLLOWS:

(1) The said Thomas W. Banks shall appear either in person or by attorney in the United States Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said United States Court

of Appeals and prosecute his said appeal and shall abide by and comply with all orders made by said United States Court of Appeals in said cause, and

(2) If the judgment and sentence appealed from are affirmed, or if said appeal is dismissed, the said Thomas W. Banks shall surrender himself as said United States Court of Appeals shall direct in execution of the judgment and sentence entered under date of June 23, 1952 by said United States District Court in said cause and the said Thomas W. Banks shall pay the fine imposed by said judgment and sentence entered under date of June 23, 1952 by said United States District Court in said cause, and

(3) If the judgment and sentence appealed from is reversed, the said Thomas W. Banks shall appear for trial in said United States District Court on such day or days as may be appointed for a retrial by said United States District Court and shall abide by and comply with all orders made by said United States District Court,

NOW, if the foregoing conditions are complied with, then the above obligation is to be void, otherwise the above obligation is to remain in full force and effect.

THOMAS W. BANKS (Seal)

MORRIS KIEFFER (Seal)

ISADORE KIEFFER (Seal)

STATE OF MINNESOTA)
COUNTY OF RAMSEY) ss.

MORRIS KIEFFER, one of the sureties described in and who executed the foregoing bond, being first duly sworn, upon oath says that he is a resident of and freeholder in said State and worth the sum of SEVENTY THOUSAND AND NO/100 ($70,000.00) DOLLARS, above all debts and liabili-

ties and exclusive of his property which is exempt from execution.

MORRIS KIEFFER

Subscribed and sworn to before me this 26th day of June, 1952.

WILLIAM H. ECKLEY
Deputy Clerk
U. S. District Court
District of Minnesota

STATE OF MINNESOTA)
COUNTY OF RAMSEY) ss.

ISADORE KIEFFER, one of the sureties described in and who executed the foregoing bond, being first duly sworn, upon oath says that he is a resident of and freeholder in said State and worth the sum of SEVENTY THOUSAND AND NO/100 ($70,000.00) DOLLARS, above all debts and liabilities and exclusive of his property which is exempt from execution.

ISADORE KIEFFER

Subscribed and sworn to before me this 26th day of June, 1952.

WILLIAM H. ECKLEY
Deputy Clerk
U. S. District Court
District of Minnesota

STATE OF MINNESOTA)
COUNTY OF RAMSEY) ss.

On this 26th day of June, 1952, before me personally appeared Thomas W. Banks, Morris Kieffer, Isadore Kieffer, to me known to be the persons described in and who executed

the foregoing bond, and they acknowledged that they executed the same as their own free act and deed.

WILLIAM H. ECKLEY
Deputy Clerk
U. S. District Court
District of Minnesota

The foregoing Bond is hereby approved this 30th day of June, 1952.

ROBERT C. BELL
United States District Judge

(Caption of Action.)

NOTICE OF MOTION

TO:

Philip Neville, United States Attorney
C. U. Landrum, Special Assistant United States Attorney
Miles W. Lord, Assistant United States Attorney
221 Federal Courts Building
Saint Paul 2, Minnesota

PLEASE TAKE NOTICE, that at the Federal Courts Building, 6th and Market Streets, Saint Paul 2, Minnesota on September 10th, 1952, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, the above-named defendant will move the Court as set forth in the attached motion.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Defendant

(Caption of Action.)

MOTION FOR REDUCTION OF SENTENCE

The above-named defendant hereby moves the Court as follows:

For a reduction of the sentence imposed upon the defendant under date of June 23, 1952.

For the suspension of the execution of the sentence imposed upon the defendant under date of June 23, 1952, and the placing of the defendant on probation.

Said motions are made pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the Federal Probation Act and upon all the records, files and proceedings heretofore had in the above-captioned matter and upon such further material as may be adduced at the time of the hearing.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Defendant.

ORDER

(Caption of Action.)

The above named defendant on September 10, 1952, at the Federal Courts Building, St. Paul, Minnesota, presented to the undersigned Judge of this Court a motion for an order modifying the sentence and for suspension of the sentence and the application of probation under the Federal Probation Act.

Mr. C. U. Landrum, Special Assistant United States Attorney, and Mr. Miles W. Lord, Assistant United States

Attorney for the State of Minnesota, appeared for the United States.

Mr. John W. Graff and Mr. Jerome Hoffmann appeared for the defendant.

The foregoing motion was considered by the Court and overruled on September 26, 1952, on which date the court filed herein its opinion. The court of its own motion orders that its said opinion signed on September 26, 1952, be and it hereby is withdrawn, set aside, and for naught held and in lieu thereof the court files a supplemental opinion copy of which is hereto attached and made a part hereof.

Dated: October 20, 1952 at St. Paul, Minnesota.

By the Court:

ROBERT C. BELL

United States District Judge.

The opinion of the District Court on the Motion to modify the sentence is reported in 108 Federal Supplement 14. This opinion is incorporated into this record by reference thereto with the same force and effect as if it were reprinted herein.

(Caption of Action.)

MOTION

The above-named appellant hereby respectfully requests an order of this Court extending the time within which the printed record and printed brief may be filed to and including October 15, 1952.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14,648

September Term, 1951.

THOMAS W. BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

On motion of counsel for appellant it is Ordered by this Court that the time within which the printed record and printed brief of appellant may be filed in this Court in this cause is hereby extended to and including October 15, 1952.

August 22, 1952.

(Caption of Action.)

MOTION

The above-named appellant hereby respectfully moves the Court for an order as follows:

(1) Setting the above-captioned case for hearing at the March, 1953 term of this Court and giving it an early date for argument.

(2) Extending the time within which the printed record may be served and filed to and including November 15, 1952.

(3) Extending the time within which the appellant's brief may be served and filed to and including December 15, 1952.

(4) Extending the time within which the appellee's brief may be served and filed to and including February 1, 1953.

(5) Extending the time within which appellant's reply brief may be served and filed to and including February 15, 1953.

HOFFMANN, DONAHUE & GRAFF
JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14648

September Term, 1952

THOMAS W. BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

On motion of counsel for appellant, no objection having been filed by counsel for appellee, this cause will be placed on the calendar for hearing at the March, 1953 session of this Court, and briefs may be filed at the times indicated in the motion.

October 3, 1952.

(Caption of Action.)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the above-named parties through their respective counsel, as follows:

1. That the time within which the printed Record in the above-captioned case may be served and filed is extended to and including December 31, 1952.

2. That the time within which the appellant's Brief may be served and filed is extended to and including January 24, 1953.

3. That the time within the appellee's brief may be served and filed is extended to and including Febraury 24, 1953.

4. That the time within which the appellant's reply brief, if any, may be served and filed is extended to and including any time before argument of said cause. It is

FURTHER STIPULATED AND AGREED, by and between the above-named parties through their respective counsel that an Order may be entered setting such times for the filing of the Record and Briefs.

PHILIP NEVILLE
United States Attorney
Attorney for Appellee

JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant

(Caption of Action.)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the above-named parties through their respective counsel, as follows:

That the original exhibits introduced and received in evidence in the trial of the above-captioned case may be filed in the United States Court of Appeals for the Eighth Circuit and upon being so filed, they are to be regarded as being part of the record on the appeal of said case; that the Clerk of this Court hereby be authorized and directed to forward to the Clerk of the United States Court of Appeals all of said exhibits, but said exhibits are not to be forwarded until ten (10) days prior to the opening of the March, 1953, term of said United States Court of Appeals for the Eighth Circuit; and that the above-named Court may make and enter the attached proposed Order without any other or further notice to the parties or their attorneys.

PHILIP NEVILLE
United States Attorney
Attorney for Appellee

JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant.

(Caption of Action.)

ORDER

Pursuant to the attached foregoing stipulation of the parties through their respective counsel,

IT IS HEREBY ORDERED:

That the Clerk of this Court be and he hereby is authorized and directed to forward to the Clerk of the United States Court of Appeals for the Eighth Circuit at St. Louis, Missouri, all exhibits introduced and received in evidence in the trial of the above-captioned case and that such exhibits are to be forwarded ten (10) days prior to the opening of the March, 1953, term of said United States Court of Appeals together with a certified copy of the foregoing Stipulation and Order.

ROBERT C. BELL

United States District Judge.

BLEED THROUGH POOR COPY

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In the United States Court of Appeals
for the Eighth Circuit

No. 14,648 Criminal

THOMAS W. BANKS, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

EXCERPTS FROM TESTIMONY OF JOSEPH A. O'GORDON

(Tr. 156-157)

By Mr. LORD:

Q. Mr. O'Gordon, during the fall of 1950, did you have occasion to go to the office of Arthur Stone, the head of the Special Agent of the Bureau of Internal Revenue?

A. Yes.

Q. Did you there with Mr. Stone, Mr. Meshbesher, Agent George McKusick, Agent Arthur Thomas, discuss matters concerning the income tax liability of Thomas W. Banks?

A. Yes.

Q. Did you then request that those officers furnish you with a list of questions and that you would then submit the questions to Mr. Banks and return his answers?

Mr. GRAFF: Just a moment. I will object to the question as leading and suggestive.

The COURT: Oh, you may answer the question.

A. I answer the question, yes, but it did not originate with me.

Mr. LANDRUM: The answer is yes?
The WITNESS: Yes, it was discussed, yes.

Q. (By Mr. LORD) And did you agree to take these questions to Mr. Banks and return with the answers?

Mr. GRAFF: Just a moment. That is objected to as leading, Your Honor.
The COURT: You may answer.

A. I do not recall ever—I do not remember suggesting that I would take them to Mr. Banks but I did agree that we would accept the questions and try to answer them, for the purpose of settling a civil tax——
Q. (By Mr. LORD) I am going to ask you for a yes or no answer.
A. Yes.

• • •

(Tr.166)

Q. (By Mr. LORD) Now, Mr. O'Gordon, I hand you Government's Exhibit 70, and Government's Exhibit 71, and ask you to study those exhibits carefully and to compare the answers contained on Government's Exhibit 71, with the questions contained on Government's Exhibit 70 and to determine whether or not the answers set out there are set out opposite the questions which they purport to answer?
A. (Witness complies.)

The COURT: Have you about finished with your examination? Is there a question pending? If so read it.

(The question was read.)

Mr. LORD: Would the reporter please read the question.
The COURT: Read the question, Mr. Reporter.

(The question was reread.)

A. Exhibit 71 answers the questions, and they were answered by us.

Q. (By Mr. LORD) What is your answer to the question which I have put to you? Does Exhibit 71 contain the same answers that you have seen on Exhibit 70?

A. Yes.

EXCERPT FROM TESTIMONY OF F. J. WICKERS

(Tr. 296-297)

Q. Then this check represents a payment of $4,500.00, plus $180.00 interest?

A. That is right.

Mr. LORD: At this time, Your Honor, I offer in evidence Government's Exhibit 112.

The COURT: It is received.

Q. (By Mr. LORD) Now, Mr. Wickers, I note that on the reverse of Government's Exhibit 112 it bears only your own endorsement, is that correct?

A. It has my endorsement on top, yes.

Q. And whose endorsement is underneath?

A. That is my father.

Q. Well now, what does that demonstrate with reference to the manner in which that check was cashed?

A. Well, it represents that my father cashed the check for me at the bank.

Q. And what did he do with the proceeds?

A. He gave the money to me.

Q. How much of the money?

A. $4,680.00.

Q. And what did you do with the money?

A. I turned the money over to Mr. Banks.

Q. Did you say Mrs. or Mr. Banks?

A. I believe I—at the time I gave it to Mrs. Banks.

Q. It represented a loan from Mr. Banks, however, you stated ?

A. That is right.

Q. And that was on approximately the date which the check bears, was it not?

A. That is right.

Q. You mean, then, to say that you gave Mrs. Banks $4,680.00 in cash?

A. That is right.

Q. On approximately March 12, 1948?

A. That is right.

EXCERPT FROM TESTIMONY OF LEONARD H. WEINSTOCK

(Tr. 579-582)

Q. Did either Thomas Banks or Rita Banks ever furnish you with any personal account books?

A. No.

Q. Would you be good enough to tell us just what kind of information Thomas Banks brought to you himself from which you prepared his income tax returns?

A. Such income as he had from what was called as "the book," the Pearson News, was given to me by Mr. Banks personally.

Q. Now, such information as he had from what is called the book, the Pearson News, was given to you by Mr. Banks, is that correct?

A. That is correct.

Q. In what form was it given to you?

A. Usually it was on an adding machine tape.

Q. Then, as I understand it, as Mr. Banks—I do not want to lead, I am sorry—insofar as the Pearson News angle of the matter is concerned, he would bring you a tape from an adding machine?

A. That is right.

Q. And was there anything there to indicate the source of that income?

A. No.

Q. Did you know the source of it?

A. He told me.

Q. What was it?

A. He said it was wagering.

Q. Wagering?

A. Yes, sir.

Q. That is the same thing as gambling, isn't it?

Mr. GRAFF: Just a moment. Objected to as argumentative.

The COURT: Well, you need not answer the last question.

Mr. LANDRUM: All right.

Q. (By Mr. LANDRUM) And that was what Mr. Banks brought you to incorporate in your income tax returns insofar as his income from what we know as Pearson News Service was concerned?

Mr. GRAFF: Just a moment. I will object to that on the ground that it is repetition and it is leading and suggestive.

The COURT: You may answer.

The WITNESS: May I hear the question?

The COURT: Read the question.

(The question was read.)

A. Yes.

Q. (By Mr. LANDRUM) Now, Mr. Weinstock, could you tell us, to the best of your knowledge, during the years that you made up Mr. Banks' income tax returns, up to and including the year 1947, and no further, about what proportion of his income which you made the returns for was derived from wagering?

Mr. GRAFF: Just a moment. We will object to that on the ground that that is not the best evidence. The returns would be the best evidence of that fact, which are in evidence.

The COURT: I think this witness may answer that question, if he can.

Q. (By Mr. LANDRUM) Just your best judgment.

A. As a general question, it is quite hard to answer it because there are various things included in there, sales of property and so forth.

Q. I was asking you about wagering, what proportion?

A. What proportion? I could not answer that without knowing what else was in the tax returns in those years.

Q. Mr. Weinstock, is it fair to say that a rather large proportion of it was wagering?

Mr. GRAFF: Just a moment. We will object to it on the ground that it is leading and suggestive and further objected to on the ground that it is not the best evidence. The tax returns are in evidence and I assume that they would be evidence of that fact.

Mr. LANDRUM: I will withdraw it, Your Honor. The returns are in evidence.

Q. (By Mr. LANDRUM) In connection with these returns which you made out and in which you included amounts for wagering, was there any information given to you as to the source of any particular money that was included in the total?

A. No.

ARGUMENT

By Mr. HOFFMANN

Mr. HOFFMANN: Your Honor, and Members of the Jury, I suppose that it is to you now quite obvious and apparent the responsibility that rests upon lawyers representing a taxpayer or a person charged with any offense. I am sure you appreciate that there is in the entire field of human affairs and human relations no other such relationship. In its intimacy, its responsibility—by this relationship one asks another for the time being for this purpose, if you please, to be his mind, to be his voice, to be his conscience.

We then—Mr. Kyle, Mr. Graff and myself—have become counsel for the taxpayer. Counsel for the plaintiff, three in number, sit here (indicating). This responsibility rests heavily upon us, and as part of our responsibility and task it has become our responsibility to determine the method of procedure in this case,—the manner, if you please, of its presentment to you. We have without hesitation on the basis of our oaths as officers of this Court assumed that responsibility. The method of presentment and procedure as to determination has been ours. If you find fault with it, blame us: do not blame the taxpayer. Blame us, but attribute it, if you will, to an overindulgence, at the best, of zeal on our part for our cause and for our

client. And believe, if you will, that we are in this case doing as lawyers for our client the kind of job that everybody in this room would desire to have done for him or for her by their lawyers.

If anything we have done or anything we have said throughout the trial of this case, or from the very second until its completion, has met or does meet with your displeasure, again we ask you to charge it to us, the attorneys, and not to the taxpayer. It is our fault, our responsibility.

It is apparent to you now, I am sure, as it must be to every person in the court room, that when the forces of the government are directed at one person, they are almost overwhelming—whoever might be that person.

They descend upon you like an avalanche and it would appear you stand there almost helpless. But fortunately long ago at the very day of beginning of the country itself, it was constitutionally declared and ordained that people in that position would not stand alone or stand unprotected. They were given certain cloaks of protection to wrap and drape themselves in. Reversed principles that are without beginning in law speak for a person at such a time. They declare in thunderous voice that he shall be tried under certain prescribed forms and rules; that he shall have the right of trial by jury, and that he shall be presumed innocent until the avenue of every presumption that he is innocent is sealed by proof.

Now, those my friends, are not idle, empty words. On Memorial day, 1952, we find ourselves here,—the one day that is so typically American that throughout the world it represents America. Your government and my government is only you, and you, and you, and you, and you, and me. There is nothing mystical or overwhelming about the phrase "the Government of the United States." It is nothing more than a collection of all of us. It is us, and I say that our government exists and will exist as it does only because it has and only because it must be bigger than any individual. If the government of this country ever gets to the point where it overwhelms and demolishes the dignity and the individuality of a person, all is lost, all is

gone; "iron curtains" have descended in front and in back of us.

The dignity, the respect of an individual in this country, is what makes it different than Russia, than China, than Northern Korea. That is what we must maintain. That is why the judicial system in country was invoked and maintained, and when I say, as I will repeatedly, certain principles of law are ordained and proclaimed and they abide with this taxpayer throughout this trial, they are not empty words to be bandied around in a court room. People gave their lives for them in terms of thousands and thousands of people over not scores but hundreds of years.

And so in this case, as the Court told you following Mr. Landrum's opening statement, it is by law declared that the return of the indictment in this case is in no manner and to any degree evidence of guilt on the part of the tax payer. You must not consider it as such. If you do, you violate your oath. You destroy the dignity and respect of the individual. You tear out the cornerstone of the edifice called the Government of the United States.

And he likewise told you, did His Honor, Judge Bell, that the taxpayer is presumed to be innocent, and those are not idle words. I can only point out to you the true significance of those words, the deep, the full meaning of them, the complete protection they reflect and represent by suggesting to you that if any person in this court room stood accused of the commission of any crime and was on trial in court, visualize if you will a little old lady clothed in gray called justice, who stands there with her hand out above that person's head from the very beginning of the trial until its completion, my friend, and who keeps repeating audibly, if you will, "You are innocent, you are innocent, you are innocent, you are innocent"—ad infinitum, until and during all of the testimony, and those words must ring in your ears and that protection must by you be given to the taxpayer or you destroy the purpose of our country.

Taxes are important. Their assessment and collection are imperative for the maintenance of the country. I will concede that. But I say that all the treasuries filled with

taxes, all the wealth in the states represented by individual holdings transferred to the government, would be as nothing but gall in your mouth and my mouth if by the collection of taxes alone the purpose of government was accomplished.

Let me suggest that taxes, as important as their collection after assessment and determination be, other things are of importance. To me it would be less satisfying to live in Russia and have the tax collector come out into the street and say, "I shall take 80 bushels of your wheat."—even before you plant it than to have in America the right of trial by jury and presumption of innocence.

Then there is one more cloak of protection this taxpayer has, and again I don't talk idle words or make empty gestures. His Honor as part of the law in this case will tell you these things abide with the taxpayer throughout this trial, that they are ordained, proclaimed law of this country, and that it never becomes the duty of a person accused of the commission of any crime when on trial to prove his innocence. Think of what a beautiful thing that is, in the light of your understanding of the trial of the Catholic clergy in Austria and the other people in the other countries. You don't prove your innocence. The law says it is this kind of country; the law declares it is this kind of country.

Again we are back to the basic thing of the country, the individual's respect and individuality. And so the law carefully and wisely and prudently says, "If you level a charge in any criminal court room against any person charging the commission of any crime, high or low, you must prove the commission of the crime with respect to every essential element of the crime beyond all reasonable doubt.

The Court will explain the term "reasonable doubt" to you. I am sure after you listen to it that you will understand it as I do to mean substantially this—nothing more and nothing less—by proof beyond a reasonable doubt is meant testimony of such a character and nature as will impress the minds of ordinary prudent men and women with a conviction upon which they would act without hesitation in the most important affairs and concerns of their own lives. Understand that term, abide with it, apply it to the

evidence in this case, and you will find that the ruler is longer than the garment that was cut to fit the taxpayer.

It doesn't fit the requirement of proof. I don't like my government to be unfair in any respect. Neither do you. You don't want it to be unfair to anyone, to anyone at all in this room, or in any room, or on any street. The government is too big to lend itself to that kind of practice. The government in this kind of case can only act through its agents, or officers, or employees. Ask yourselves, with the greatest of frankness and sincerity—and answer yourselves—Did the government act in good faith throughout this trial?

At the very opening of the case last week the government, through its testimony of agent McKusick, threw out to you this statement: "I started on April 2, 1946 with a group of agents to investigate graft payments to public officials in the City of Minneapolis, including the taxpayer."—and they left that statement there for you. I like to consider—as I see it and I am one for speaking frankly and declaring my mind—I like to consider it as the "shot of poison" they wanted you to have in your arm and in your mind as you began to hear the testimony in this case. Later on it was developed on cross-examination of Mr. McKusick by an emphatic answer on his part, "No, I found no evidence of payments of graft by this taxpayer."

But for several days, and for several reasons as I would see it, they wanted that thought to linger in your mind. They wanted you to sit there looking at him, the taxpayer, as testimony was adduced in behalf of their case, tagged and tainted with the brush of suggestion,—an "old wives' tale" is the expression he used,—150 old wives he ran down and got tales from, and he came in here and suggested you were concerned with a person in the person of the taxpayer who was a graft payer to public officials. And they knew he hadn't—they knew as surely as we all sit or stand in this room the taxpayer hadn't done that. He finally told you. Is that, my friends, the candor,—is that, my friends, the frankness,—is that, my friends, representative of the kind of government agent you want to deal with you?

Take these figures on their charts. Do they for a moment suggest to you that we are afraid of any exhibit in this case? Do they think that we are afraid of Exhibit 33, afraid of Exhibits 70 and 71, the clever and little questions propounded by the man who sought to taint someone with a brush that didn't concern him? Twenty-eight questions were propounded and his answer was finally, as an accountant, "I knew the answers before I submitted the questions."—your government, your government, your government,—"and all I wanted was a grain of evidence for the attorney."

I want my government to be bigger than I am. I have a right to expect that my government will be bigger than I am,—not smaller than I am, or smaller than a worm!

What was the meeting for that set up in Mr. Stone's office in the fall of 1950 that resulted in the preparation of Exhibit 70 and the answers represented by Exhibit 71? Intent to conceal by the taxpayer? Determination to evade by the taxpayer? Consider the absurdity. Reflect upon the fallacy of the contention, as demonstrated by the very exhibits they ask you to use as the noose to hang him,—Exhibits 70 and 71,—the very answers that they have converged down into this chart, and let's talk about the chart. I think they thought we wanted to evade that chart and distract attention from it. To me the chart is symbolic of the old days when the Orpheum Circuit maintained, and you used to go in and you would buy a seat in the gallery for a quarter, and out would come Jack Benny—when he still had his hair—and he would play the violin, and behind him was a painted fly, as they call it, or drop and it was made up then and made up now of the same material, canvas with paint, and Jack Benny would stand in front of what purported to be a sofa, in what pretended to be a room, before what pretended to be wallpaper, and he would play the violin, and all the time you knew and I knew, siting on your quarter seat, that it was not a davenport, that it was not a parlor, that it was not really wallpaper, but that it was a piece of canvas!

I am for hanging people from substantial scaffolds. I

don't like to build a scaffold out of pencil points and paint brushes and canvas. I don't like my government asking twelve people to determine the serious rights of this taxpayer based upon calculations founded upon speculation,—assumed from conjecture, if you will, sir. What do you know about this Exhibit 225 as to its sources of information? I know so much it nauseates me. I know it from what was said on this witness stand, and let me tell you what was said as to where the information that there is reflected came from,—the very information as to the last three lines that they say, "pull it around his neck."

It was testified that this chart was made up in the spring of 1951, one year ago, except that he said last Friday night, one week ago today, he made some minor alterations and changes, and he tells you, "I made that chart up, based upon all of the exhibits in this case." There weren't any exhibits in this case last May,—all of the exhibits had not been introduced last Friday. "I made up this exhibit, this chart, from those exhibits, from all of the testimony in this case." There was important testimony here Saturday and Monday after he told you that. And finally he went so far—and this is what I want you to heed and never forget. You will remember it and if you convict this taxpayer, it will haunt you the rest of your days. You will have many sleepless nights. You will wake up in the cold dawn of many mornings and shudder to think of what you accomplished, or lended yourself to, if you convict this taxpayer. He then said, this witness, the agent of the government—your government and mine—that the chart was made up from all of the testimony and all of the exhibits, but finally he was driven by Mr. Graff to saying, "Well, I put that away and I took this out of the testimony. I rejected part; I accepted part." He is going to tell you what testimony to believe, because he prefers to believe that part and reject some other.

But he went further than that. Then he told you out of a clear sky yesterday that it also represented his conclusions, "and the conclusions of my"—his very words, so help me—"my associates." And who were his associates?

It has always been by me considered elemental and in all fairness that a person who makes a charge against someone, or who participates in the making of that charge, should have the temerity and the courage to face the person he accuses. I don't like people talking about me behind my back. If it is true, I want them to tell me to my face. If it is true, I deserve it. If I am wrong, I can't explain it; if I am right, I don't need to explain it.

It represented the conclusions of his associates. Those are four things now. Then he went further and he said it also represented his interpretation or acceptance of certain information from a report of certain agents made back in 1936 or '37,—a report not in evidence. You don't know what agents interpreted what conduct or what transactions, or placed what interpretation upon their subject. Then he went further and he told you that it also represented in part his conversation with some agent in New York, or his understanding of what that agent in New York found in that connection with respect to the National Plastics item.

Do you want to determine the serious question here of this taxpayer's rights on the basis of that kind of testimony? Do you want that to happen to this taxpayer,—to me, to you, to anyone? Would you do it to the person you most detested? I am hoping you don't, but if you do,—if you hate or detest anybody, would you do that to him? That is what he had done.

That, as Mr. Lord tells you, the last three lines, is their case. Knock away the prop, any one of those six (indicating), and the whole case tumbles in ashes at their feet. I suggest that you do it and I suggest that you as jurors individually and collectively rise up in your might, in your power as jurors, and declare, "Government, this you shall not do—to him, to me, to anyone. This I shall not lend myself to. This I shall not as an officer of this Court lend my power to."

What do you think of the temerity of it? They are only concerned with the unreported income in the last three years, and yet he tells you $73,000 in '43, and $78,000 in

'44. Which rope does he want you to use? Which gun is he pointing at who? What is the purpose of the figures before 1945? How stupid, my friends, do you believe the taxpayer to be? How stupid do you believe any person would be,—you would be, or you would be,—if you knew back in 1947 you were being investigated, a man of wealth, a man of responsibility, as to what they say the chart discloses and demonstrates? And they want you to believe he is that stupid.

Fairness, frankness—Weinstock—why don't we call him? Mr. Weinstock took the stand and almost before he opened his mouth, "Didn't you say so-and-so and such-and-such?" They never asked Mr. Weinstock one question that they should have asked, in fairnes, because it developed from Mr. McKusick's testimony that three weeks before the day of his testifying he knew from Mr. Weinstock that the taxpayer had $19,000 from a man named Herman Mitch, who the good Lord saw fit to call out of this world. When did Herman Mitch die,—of great importance?—much dust thrown to confuse you and mislead you from the main point of the drama. He knew three weeks before the trial opened that $19,000 had been paid to the taxpayer by Herman Mitch before his death, and not one word of testimony was elicited by counsel for the plaintiffs concerning it. Yet he amended the chart as to unsubstantial, unimportant matters, as he determined them, last Friday night.

There is so much to say I could talk for days, I am sure. I want you to understand this, however, that by permission of the Court there has been allowed the taxpayer the privilege of having two counsel speak for him. Mr. Graff will make an additional presentation to you. But I ask you to bear in mind from this very moment on, and bear it in mind seriously for the rest of the trial, that when Mr. Graff sits down, not one more word can be said in behalf of this taxpayer to you. That is our last opportunity to speak in his behalf. Subsequent thereto counsel for the plaintiff is permitted the final argument under the federal rules and then the Court charges you. Now, we cannot

make response to that argument. He can tell you, so to speak, anything he wants and may suggest by his statements that we should make answer. But we can't. And so if you think that there is something that I should have said,—if in your mind you find there is perhaps something you wanted Mr. Graff to say,—if, putting yourself in the position of the taxpayer or having him represent someone close and dear to you, there is something further that you would want from us, believe me, by friends, our failure to touch upon it is unintentional and only because of lack of time, or because of our considered opinion that other matters were more imoprtant and so we didn't. It is not deliberate.

There isn't one thing in this case. Exhibits 33, 70, 71, 224, 225, and Exhibit 214,—the creation and handiwork of the agent. The man who worked on this matter for five long years, 150 people interviewed,—he went to every bank and pulled out every cashier's check, every certified check, every money order. For five years he worked on him and then from the witness stand he said, "No, I have not been able to find or identify one source or item of income omitted from the returns except as to immaterial or small matters."

He exhausted every method,—direct income, receipts and disbursements, the testimony method, a combination of all, and then he pursued it further and further and decided that he would take the pattern that fit the cloth as he wanted the pattern to be. For five years he worked and he wasn't able to show graft. I suggest it may be a reasonable inference that he decided he had better show something and he didn't care how he showed what! For five years he pursued relentlessly his way into, through, around, about and under all of these things, and he hasn't yet pointed out to you one item of income that wasn't reported by the taxpayer in '45, '46, or '47.

Why do they drag in '41, '42 '43, and '44?—scenery. Jack Benny's violin was too small. It wouldn't cover up the whole brick wall, and they had to lower the fly in back. McKusick knew those things. He knew all of the answers. And then he brings it in and throws down five

years of work in the lap of Mr. Kleven and says "Tie up the knots." If when the knots are tied you don't weave a pattern of conviction, go out and get conclusion. Go to New York and ask the agent what he thought. Go to a report that nobody will see, and read it and interpret it. Listen to the witnesses in the court room and you decide what they say. Reject what you don't want. Accept what you do want.

Could it be that this is a case of agents engaged in law enforcement, so to speak, who prefer to remember only what is harmful, as they consider harm established, and not prefer but insist upon not remembering what is helpful,—insist upon not remembering what is beneficial?

Don't be misled. The government must prove its case. The taxpayer need not prove his innocence. You are not here, as the Court takes judicial notice, to collect taxes for the government. This is not that kind of a proceeding. There are other tribunals to determine what taxes he owes and how they shall be collected. He shall meet that there that day, not here now.

THE COURT: The jury may retire for a brief recess.

(Whereupon, at 11:30 o'clock a brief recess was taken.)

The COURT: Proceed, counsel.

ARGUMENT

by Mr. Graff

Mr. GRAFF: If the Court please, and gentlemen of the jury: I am very happy to have the privilege of talking to you about the events and the things that have transpired here during the last two weeks. I can only be commendatory of the interest that you have manifested throughout the trial and I see from that interest that you are all inspired with a firm desire to do justice by Tom Banks and to acquit your consciences in such a manner that the experience here will have been a most pleasant one, a most interesting one, and an instructive one.

The charge in this case is as follows: Tom Banks is

charged with having wilfully and knowingly attempted to evade and defeat a substantial portion of the tax which was owing by him for the calendar years 1945, 1946, and 1947. I make that statement because counsel for the government said that the case concerned an understatement of income by Tom Banks. The issue and the only issue is whether Tom Banks wilfully and knowingly attempted to evade and defeat a substantial portion of the tax that was owing for those three years, and if the evidence which is adduced here does not satisfy your minds beyond a reasonable certainty of the truth of that allegation, you have no other duty but to acquit Tom Banks and to acquit him promptly.

Let me ponder the charge which has been made and let us examine the evidence in the light of the charge and see what the government has adduced to sustain it. Have in mind that the charge says that Tom Banks wilfully and knowingly attempted to evade and defeat. What evidence has there been adduced from this witness chair about Tom Banks' wilfullnes and his knowingness? Search your minds and let's see what that testimony has been to date.

My notes reveal a fellow by the name of Jeff Halvorson, from near Grand Marais, testified that he made a loan from Tom Banks in the sum of $1,400, and Jeff Halvorson testified that he had an arrangement with Tom Banks to pay that loan back at the rate of $25 per month, but both Jeff Halvorson and his wife became ill. Tom Banks, according to Halvorson's testimony, said, "Well, pay it when you can." There is one item about Tom Banks that has come out in this testimony.

Do you remember when the real estate man was on the stand and he was telling you about the real estate transaction which he had handled? The real estate man was Philip Brancheau. Philip Brancheau told you—and, mind you, he was a witness for the government—that some land was being purchased from a widow woman who had some boys who did not want to farm, and the land was sold, I think, for a consideration of $8,500 and the assumption of a mortgage against that land, and Philip Brancheau testi-

fied when Tom Banks found out that it was a widow woman, he told Philip Brancheau, "Don't charge that widow woman a commission for selling that land. I will pay you the commission."

That is the kind of testimony that we have had about the kind of an individual that Tom Banks is. Now, they talk about Tom Banks wilfully and knowingly evading the tax. Where did he have his assets? He had a substantial portion of his assets invested in real estate, in rural Hennepin County. All those deeds and abstracts are on file. If he was attempting to fool somebody, he wouldn't be putting his money into real estate where everybody could very easily find it. He also had certain transactions with stock-brokers, and all of those transactions were revealed by records which were produced here in court. He didn't try to fool anybody about what he had or where it was.

And when the government, as a result of that meeting down in Mr. Stone's office on August 22, 1950, decided that they wanted to get the answers to certain questions, Mr. McKusick drafted the twenty-eight questions which are now embodied in Exhibit No. 70, and those questions were submitted to Mr. O'Gordon, and Mr. O'Gordon came here and testified that he had seen Tom Banks and he had seen Mr. Weinstock and he had gotten the answers and later gave the answers to Mr. McKusick, and if you will examine Exhibit 71, you will note that those answers were given to Mr. McKusick on February 1, 1951. Look at those questions. If Tom Banks wanted to fool somebody, do you suppose that he would furnish voluntarily to the government answers to a series of questions that they wanted from him? If there is something that you can derive of the kind and the character of a man he is, you can find it in those transactions.

They asked him for the information and he gave it to them as best he could. And wasn't it interesting to find out when we get to the court room that these questions were a little bit more sinister than we were first led to believe? As Mr. McKusick put it so definitely, it was the "last little grain" that he was lacking. He knew the answers to most

questions, but it was that last little grain that he wanted. And the answers were submitted to him and they have now been embodied on the chart before you. Nobody attempted to hide anything.

Now, counsel for the government has alluded to the fact that the questions pertaining to cash were not in there and were not answered on that series of questions. That is correct. What did the government do when it did not get the answer to those questions? Mind you now, this is the strong arm of the investigatorial branch of the government. It is seeking information and it has the time and the funds and the occasion to make this investigation. Did you hear one word from this witness stand what the government did after it got the answers to those questions on February 1, 1951 about getting the answer as to that cash?

I heard not one single solitary word. If the government wanted the answer to those questions, why wouldn't they pursue it when the questions were not answered as to the cash? I can only suggest the reason for it. I cannot look into their mind and analyze their conscience, but I know this, that if I want to find out something, I will exert every possible effort to find it out. After they got the answers to these questions, according to their testimony here, they did not do one, single, solitary thing about it. Why? I will tell you why I think so,—because it served their own purpose not to have the information. If it was important for them to get it, why didn't they dispatch these legions of investigators out to get this information?

And wasn't it interesting after Mr. Kleven was on the witness stand and we had this chart produced here, that we found under the cash items that they had not credited Tom Banks with any cash except a few dollars which were in bank accounts. They made no effort to find it out. It served no purpose for them, and they had every reason to exclude it from you. Do you remember Mr. McKusick's testimony when he told you the different methods as to how he decided to attack this case? You remember he had the bank deposits method and he said he abandoned that because it was not equitable to the taxpayer and to the

government, and then he talked about the receipts and disbursements methods, he talked about the testimonial method, and then he finally decided that the net worth method was the method that he would use. Have in mind that he made that determination after this corps of investigators descended upon the City of Minneapolis across the river, and remember his testimony, they went to the banks and they examined every single check, every single bank draft, face and back, and they correlated it all into a pool.

I thought the days of the "witch-hunt" had passed away a long time ago. That is what this was. It was a witch-hunt and it was characterized here as an investigation to determine whether there were any graft payments to members of the city government in Minneapolis, and then after starting on that investigation on April 2, 1946, it continues and, according to Mr. McKusick's testimony, it continued until the latter part of 1947, when the drive became most intensive, and then it continued in '47, '48, '49, and you remember, I asked him,—When did he complete his investigation? And after we fenced for a while, he finally said he completed his investigation in the fall of 1951, if I regarded August as being in the fall.

Mr. Kleven got into the case in 1951, and between Mr. Kleven and Mr. McKusick, the information was correlated. Now, let me come back to the questions and answers just a moment, Exhibit 70. You will recall on Exhibit 70 was the question concerning the $25,000 check of National Plastics. And on the questions and answers there was disclosed the fact that this taxpayer had a one-half interest in that check of National Plastics and I direct your attention to Exhibit 221,—May I have it, please, Mr. Clerk?

The CLERK: I have it right here, sir.

Mr. GRAFF: (Continuing) Exhibit 221, if you will recall, was Mr. McKusick's chart to determine the investment in McCarthy's. And if you will look at the first column of figures, he has down there the investment of $25,000 in McCarthy's under the name of Rita Banks or Tom Banks. Exhibit 221 was brought into this court room during Mr.

McKusick's testimony. Those answers to those questions were given to Mr. McKusick under date of February 1, 1951. This is May, 1952,—one year and several months later. And they either were so careless—or they had an ulterior motive—that they couldn't even take this exhibit and correct it in accordance with answers which had been given to them.

They had the information ever since February 1, 1951 and it was given to them voluntarily. And if you will look at Exhibit 221, you will find the name of "J. J. Keegan," and you will recall when Mr. McKusick was on the stand, I asked him to show me in the general ledger of McCarthy's where the name of J. J. Keegan was, and he couldn't find it. When he came back the next day, he said it was a mistake. I will give him credit for admitting that he made a mistake, but is that the sort of work that you people are to rely upon? Is that the sort of carelessness upon which they want you people to try an individual accused of a very serious offense? Is that what they want to base it on?

Now, let's talk about Exhibit 33. Exhibit 33 was an affidavit given by Tom Banks under date of July 2, 1937, and it was given as part of a compromise offer to settle an alcohol tax liability. That is the testimony in this case. I called attention in this Exhibit to the fact that while it was dated July 2, 1937, the attachment to it refers to an affidavit of Tom Banks under date of April 8, 1937,—and I forget who the witness was on the stand,—but he said, "Well, he hadn't noticed it before but that referred to some earlier proposals which had been made to settle that particular matter.

Now, there is nothing wrong morally or legally in submitting a compromise offer for an obligation which the government claims it is due. That is sanctioned by law. He had a perfect right to submit an offer in compromise and he had a perfect right to submit an affidavit in connection with it. And it is rather interesting to now find that an affidavit given by this taxpayer in 1937, nearly 15 years ago—it will be 15 years in July—has stood the test of time.

It was considered so reliable by Mr. Kleven that he said that he used it in connection with the preparation of Exhibit 224.

Now, counsel has made reference to it, that the taxpayer said he was insolvent. Now, I want to read you that portion of it,—and let me say to you jurors, you take these exhibits with you when you go to the jury room. We have no desire to conceal any of the facts from you, or hide them from you. We are not afraid of the facts. We want you to take the facts, because we know that if you will take the facts in this case, there will be only one verdict that you can return and that will be a verdict of acquittal for Tom Banks. So please do not be afraid of the facts in this case.

I will read that portion. "It is my opinion that I am actually insolvent at the present time." He recites in there properties which he owns. The government, however, when they make up their Exhibit 224, say, "No, no,—actually insolvent doesn't work. We are going to start him off with a net worth of $18,000." We will stand on the exhibit, but they say $18,000, and when they say $18,000, they haven't made any effort or haven't any desire to find out the amount of cash, because it will upset their calculation.

Something has been said about taxes. I suppose that we all have something in common about taxes. I don't know of anyone who enjoys paying taxes. I don't know anyone who is exempt from paying taxes, either directly or indirectly. Now, this case, as I told you, was solely to determine whether Tom Banks attempted to evade or defeat certain taxes in certain years. This case is not for the collection of taxes. There are other courts and other forums in which, if a person is civilly responsible for any tax, the government can collect it, and where the issues pertaining to that civil liability can be determined. What is done here has no effect whatsoever upon the determination of the civil tax when that question is presented in the proper forum. So please do not be misled by the fact that what you may do here will determine the amount of tax that a

man has to pay, or doesn't have to pay. We are not concerned with that question.

Now, Exhibit 215 is the Len Welsh check, concerning which we have talked a good deal. It has been assumed by the government, but there has been no proof to show that the Len Welsh check, Exhibit 215, ever went to the Daily Mail. They have it on their chart as having gone to the Daily Mail, but they have adduced no proof concerning it. If you would examine the endorsement on the reverse side, it is not the endorsement of the Daily Mail. It is the personal endorsement of Len Welsh.

Why wouldn't they produce some evidence to tie it to the Daily Mail if such was the fact? They either were unable to do so, or they didn't care about doing it, and if they were unable to do so, why didn't they come in here and tell us honestly what the fact was? I suggest that you examine the check, Exhibit 215, very carefully, and there isn't anything that indicates that the Daily Mail got that check. Mr. Kleven assumed that this check had not been repaid. You remember, I asked him whether it was a loan, or how could he tell? He assumed that it had not been repaid on the basis of Mr. Weinstock's testimony, and I submit there was nothing in that testimony which would justify him in that conclusion. For all he knew, it might have been a gift.

It is our position that the evidence in this case relied upon by the government is necessarily of a circumstantial nature. I am sure that the Court will instruct you how to handle evidence of that kind, but let me point out to you that evidence of a circumstantial nature, to warrant a conviction, must exclude every other reasonable hypothesis, including the hypothesis of innocence.

The indictment in this case was returned on January 14, 1951. You will recall that counsel for the government read that indictment to you at the beginning of the case. The total of the taxes which they claimed were due and owing as of that time in the indictment was the sum of some odd $42,000.

Mr. LANDRUM: Just a moment, if the Court please. That

is objected to. That is improper argument. It is not necessary for the government to prove the exact amount set forth in the indictment. Any substantial evasion is sufficient.

The COURT: Well, that is correct.

Mr. GRAFF: I don't think I have said anything improper, Your Honor.

Mr. LANDRUM: He said $42,000.

The COURT: Very well; proceed. Stay within the record, —what the evidence shows.

Mr. GRAFF: The indictment was read to you and the figures were read to you. The total of the figures which were read to you I submit was a figure around $42,000. On Exhibit 228, if you please, the total of the taxes now claimed by the government as a result of a few weeks of trial has been reduced to some $32,000. In other words, we lost some $10,000 on the way. Maybe we should have continued in Court here for a while and we would have had some money due and owing to us!

But I cite it only to show that Mr. Kleven had made up his chart more than a year ago. The indictment was returned on January 14th and it has a certain amount, and after two weeks of trial, the amount is dropped some $10,000. What kind of business is that? Is that the kind of work and is that the kind of accuracy that we have a right to expect from people that are working and dealing with these figures, or have they been so careless in their work and yet zealous in their effort to do something to this taxpayer?

Do you recall the testimony of Mr. Kleven when he was on the stand, and I was asking him concerning the identity of exhibits which disclosed that there was no cash,—where he got the figures for cash for Tom Banks as of the beginning of the period? Do you recall his testimony? Do you remember that Mr. Kleven testified that when he made up chart 224 he made it on the basis of all the exhibits in court and the testimony, and then he mentioned all of the exhibits as we were going through. Later on in his testimony it was developed that he did not make it up only on the basis

of the testimony and on the exhibits in evidence, but he made it up on all the other things that Mr. Hoffman has already called attention to.

I would like to call your attention to that portion of the testimony and let's see whether the representatives of the government have been fair with you people. If you will pardon me just a moment, I will refer to the point in the record. For the benefit of counsel, I have volume——

Mr. Landrum: I don't care to follow it.

Mr. Graff: For the record, it is volume VII, page 872, examination conducted by Mr. Lord.

(Reading)

"Q. (By Mr. Lord) Mr. Kleven, have you been in this court room during all the trial of this case?

"A. Yes, I have.

"Q. Have you heard all of the oral testimony as to the fact?

"A. Yes, I have.

"Q. And have you had occasion to examine the various exhibits introduced into evidence in this case?

"A. Yes.

"Q. From the exhibits in this case and from the oral testimony adduced here in this court room as to facts, are you able to make an analysis and a summary under the net worth method to show the income of this defendant from the years 1936, 1941, '42, '43, '44, '45, '46, and '47?

"A. Yes.

"Q. Have you reduced such a summary to chart form?

"A. Yes, we have.

"Q. Mr. Kleven, showing you Government's Exhibit 224, can you tell me what that is?

"A. That is a typewritten copy of the figures that I prepared of the net worth summary.

"Q. Was that prepared more or less under your general supervision?

"A. Yes, it was."

Those were the answers of Mr. Kleven under examination by government counsel. I am referring to the record, Volume 8, page 987.

"Q. And after you got into the case and after you had an opportunity of going over all the material that Mr. McKusick had assembled, and made the independent investigation that he made, did you then start putting your figures together, so to speak?

"A. Yes, about that time I did.

"Q. And about when was it that you started, so to speak, to put your figures together?

"A. Oh, I could not give you any exact date now.

"Q. Approximately?

"A. It would be in the spring of 1951.

"Q. On your direct examination you indicated that you worked on this matter from January, 1951, until you completed your report in May of 1951?

"A. Correct.

"Q. Would you say that that is correct?

"A. That is correct.

"Q. And then you did not further work on this case until you were called over to the United States Attorney's office in January of 1952?

"A. That is correct.

"Q. And that since January of 1952, you have been working more or less steadily on this case?

"A. That is correct."

I then asked the clerk for Exhibit 225.

"Q. Now, Mr. Kleven, when you prepared Exhibit 224 and 225, did you include therein for the period December 31, 1936, to and including December 31, 1947, all of the property of the taxpayer?

"A. Are you asking about the entire exhibit or just referring to the first page?

"Q. The entire exhibit, for the entire period.

"A. To the best of my knowledge, all the property that we could find.

"Q. I am asking you, Mr. Kleven,—did you include it all?

"A. Yes, to the best of my knowledge, I put in everything that I could find.

"Q. Now, Mr. Kleven, did you make any search or investigation to find any other property owned by the tax-

payer during the period December 31, 1936 to December 31, 1947?

"Q. Will you read that question, please?

(The question was read.)

"A. Didn't I just answer that? Wasn't that the question you asked me before?

"Q. No.

"A. I do not quite understand that question."

Then the question was read by the reporter. He started making an answer—

"A. Yes, we made a search——

"Q. (Interposing) No, did you make any search to find any other property belonging to this taxpayer for the period December 31, 1936 to the period December 31, 1947?

"A. Yes, I did.

"Q. Did you find any?

"A. No,—I found some different valuations.

"Q. Did you find any other property?

"A. No, I found no other property.

"Q. Now, Mr. Kleven, did you personally find any other assets or liabilities of the taxpayer other than disclosed by Exhibits 224 and 225?

"A. I would say that we found some minor negligible items that are not included.

"Q. Not "we",—I am asking you personally, Mr. Kleven.

"A. Well, I have seen a couple of items,——

"Q. Did you personally find any?

"A. You mean my own personal investigation?

"Q. You, Mr. Kleven, did you personally find any?"—notice how cooperative this witness is in trying to furnish us the information. He worked on this thing,—started in January of 1951. He completed his report in May of '51. He started again in January, 1951, and has been working on it continuously. Let me skip and come to the questions concerning the cash.

"Q. Now, Mr. Kleven, on Exhibit 224 you show what figure of cash in the possession of the taxpayer as of December 31, 1936?

"A. $159.15.

"Q. What proportion of the $159.15 was in the possession of Reta Banks as of December 31, 1936?

"A. That was all in the name of Reta Banks, in her bank account.

"Q. I see. And the amount of that again was how much? I am sorry, I could not get the amount.

"A. $159.15."

Now we come to the series of questions that I am trying to direct your attention to, this witness who is trying to give us all the information.

"Q. And how much cash did the taxpayer Tom Banks have in his possession as of December 31, 1946—and I would like to have you refer me to the exhibit upon which that answer is contained.

"A. He had none.

"Q. Now, would you give me the exhibit reference number? What is the exhibit reference number that proves that fact?

"A. Well, I could not count the cash he had in his pocket twelve years ago.

"Q. Just a moment, Mr. Kleven. I asked you to give us, if you please, the exhibit number that is in evidence in this case that proves the statement that you have made.

"A. Exhibit No. 33, the affidavit, reported no cash.

"Q. I hand you, Mr. Kleven, Government's Exhibit 33, which has been identified as an affidavit dated July 2, 1937, and I would like to have you point out to this Court and jury what is contained in that affidavit which shows that the taxpayer, Tom Banks, had no cash on December 31, 1936.

"A. The total of the assets listed in this affidavit are about $13,000.00. We have set them up here at about $18,000.00"—I was asking him where.

"Q. Would you please point out to me in Government's Exhibit 33, the statement or statements which show that Tom Banks had no cash on December 31, 1936?

"A. There is no statement, but I can work it back by analysis.

"Q. There is no statement in that exhibit?

"A. No, not as of December 31, '36.

"Q. I see. And there is no exhibit in evidence in this case, is there, Mr. Kleven, to which you can point which proves that Tom Banks had no cash on December 31, 1936?

"A. Well, you can say that as far as personal cash for every single year on the whole balance sheet.

"Q. Well, just take '36 first.

"A. Yes.

"Q. So there is no exhibit in evidence in this court which shows how much cash Tom Banks had as of December 31, 1936? That is correct, is it not?

"A. That is correct.

"Q. Is there any testimony in this case that you have heard that establishes the amount of cash that Tom Banks had in his possession on December 31, 1936?

"A. I do not recall any."—this was the government witness who said he made up this chart on the basis of exhibits and testimony in this case, and it took a series of questions to finally extract the truth out of him that there wasn't any exhibit in this case which showed that amount of cash. It took all those questions. Why?

The only reason I could suggest is that somebody had a sinister motive in attempting to keep from you, this jury, the facts in this particular case. And when you retire to your jury room, and when you consider what the evidence is and what the facts truly are, I think that you will have a rule of law which will assist you that if any witness in this case has testified falsely, you will be privileged to exclude his testimony except to the extent that it is corroborated by other credible testimony.

You are men of experience from all walks of life. And when you go into that jury room, you are not going to be asked to discard your good common sense that you acquire in the ordinary affairs of life in whatever work you happen to be engaged in. You have got to use it in your jobs, whatever they may be. Don't discard it when you go into the jury room. You are the barrier, if you please, between the oppression of a citizen and the rights which are due a citi-

zen. This case, started with an investigation about so-called graft in April of 1946, apparently had to have something to account for all the time and money spent on it. This I think it is.

This I think it is because they have deliberately refused to follow certain courses of inquiry which if they had wanted to get the facts, they would have followed out. The testimony of Mr. Kleven here demonstrated that he had only one purpose and one purpose only in mind—to try to make Exhibit 225 stick—and, as Mr. Hoffman told you, we are not afraid of that exhibit or any other exhibit in this case, and we are not afraid of any fact in this case.

Let me characterize Exhibit 225 for you. Exhibit 225 to me is a monument. It is a monument to the greed and selfishness of certain individuals. It is a monument of confusion, and if you do not believe that there was some confusion attendant with this matter,—you were here, you had an opportunity of observing it. These were people who had dealt with this case ever since April 2, 1946.

It is a monument. It is a monument, if you please, to governmental stupidity. And we, as citizens, have the right and the privilege, and it is one that we will never surrender —and I don't want you ever to surrender it—to criticize our government whenever we think that criticism is justified. And I say we are not afraid of Exhibit 225. We think it is a monument. We think it is a monument of stupidity. We think it is a monument of selfishness, of greed.

When you gentlemen retire to your jury room, you will have some important things to consider. I know that you will treat these matters as conscientiously as you would want them considered if Tom Banks sat in your chair and you sat in Tom's chair. Under the oath you have been given, you are to determine this matter in accordance with the testimony and the evidence which has been adduced in this court room. Under the law, you are the exclusive and the sole judges of the facts, and there is no court in this country, and there is no tribunal in this country, and there is no bureau in this country—not even the Supreme Court

of the United States—that can tell this jury what the facts are in this case. No one can take that responsibility from you, and no one can encroach upon it. That is your responsibility, and don't surrender it lightly to anyone. You are the ones who are to determine the facts,—not a governmental agent who comes and sits here and says, "I conferred with my associates," or, "I examined a bunch of old wives' tales,"—and that is what I think the facts are.

And remember, that with respect to the exercise of your judgment pertaining to those facts, you have to exercise your own initial judgment. That is your oath as a juror, and I want you to cling to that and let no one take it away, and stand steadfast by the conviction you have formed as a result of the testimony and the exhibts in this case. Stand steadfast. Be true to your oath. Treat your fellow citizen the way you would want to be treated if the tables were turned.

Finally, may I say to you gentlemen, it has been a pleasure to have been with you, and I am sure that when you get to your jury room, you will see it the way we have seen it unfold here. Give your answer to the monument. Give your answer to selfishness and greediness. Give your answer to ambition. And give your answer to the facts in this case, that Tom Banks has not done what the government wants you to believe that he has done. With that job having been done and your verdict having been returned into court, you will, of course, return to your private lives and I know that as you return you will be happier for the experience that you have had and the opportunity that has come to you to set something right which you know and must know in your hearts has been wrong.

OPINION ON MOTION TO MODIFY SENTENCE

United States v. *Banks.*

No. 7446

UNITED STATES DISTRICT COURT, D. MINNESOTA, THIRD DIVISION.—Oct. 20, 1952

BELL, District Judge.

Thomas W. Banks, the above named defendant, was indicted for income tax evasion for the years 1945, 1946, and 1947 in violation of 26 U.S.C. § 145(b). The total tax evasion was alleged to have amounted to more than $50,000. He was tried before a jury in May, 1952, and found guilty on all three counts. On June 23, 1952, a general sentence of three years in the penitentiary and a fine of $10,000 was imposed.

A motion for a new trial was presented and overruled. An appeal was taken to the United States Court of Appeals for the Eighth Circuit, which was filed on July 9, 1952 and which is still pending.

The case now is before the court on a motion for a modification of the sentence for suspension of the sentence and the application of probation under the Federal Probation Act, 18 U.S.C. § 3651, which provides:

> "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."

[1] The Probation Act conferred on District Courts of the United States the power, when satisfied that the ends of

justice, and the best interests of the public as well as of the defendant, would be subserved by suspending the imposition or execution of sentence. The chief objective of the act is to allow a period for supervision by an officer of the court to aid in the rehabilitation of a penitent offender and to offer an opportunity for reformation which actual service of the suspended sentence might make less probable. The provisions of the act generally are applied by the courts in dealing with first offenders, those who have made a mistake for the first time but whose character and background indicate a possibility of future good conduct. In dealing with hardened criminals, violators who have acquired a criminal record, persons who violate the law for profit, the smart offenders who are willing to risk detection, the courts usually have denied probation under the act. Obviously Congress did not intend for the Probation Act to be used by the courts to suspend the imposition or execution of sentence and eliminate punishment of persons deliberately engaged in violating the law. Especially is this true where persons repeatedly have been convicted of violations of the law and have shown by their attitude and conduct that the court cannot expect them to benefit by supervision under the act.

The application of probation in a deserving case is a humanitarian act of the court that invites the approbation of society, while its use in an unworthy case breeds contempt for the law. Justice properly may be tempered with leniency if sound judgment is used in selected the subjects of the court's bounty, but the criminal class must understand that when laws are wilfully and intentionally violated punishment will be certain, fearless and adequate. Enforcement of the law is essential to good government and the most effective way to prevent crime is to punish criminals.

[2, 3] The law imposes no requirement on the court to extend probation. It is a favor bestowed by the court on persons deemed worthy of the court's supervision. Probation cannot be demanded as a right, rather it may be conferred only as a privilege. Flexibility in administration is essential to an extensive degree. Each case must be ana-

lyzed to give a careful, comprehensive consideration so as to evaluate the character, qualities and possibilities of each offender, and this requires an exercise of a broad discretion.

The foregoing principles have been sustained by the courts in many decisions showing a remarkable accord in the interpretation and the applicability of the act. *United States* v. *Murray*, 275 U.S. 347, 48 S. Ct. 146, 72 L. Ed. 309; *Roberts* v. *United States*, 320 U.S. 264, 64 S. Ct. 113, 88 L. Ed. 41; *United States* v. *Johnson*, D.C., 56 F. 2d 658; *United States* v. *Nix*, D.C., 8 F. 2d 759; *United States* v. *Durkin* D.C., 63 F. Supp. 570.

Mr. Chief Justice Taft prescribes the scope of the Probation Act in *United States* v. *Murray, supra*, as follows:

> "The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real locus poenitentiae between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. Probation was not sought to shorten the term. Probation is the attempted saving of a man who has taken one wrong step, and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence. * * *"

Mr. Chief Justice Black in *Roberts* v. *United States, supra*, said:

> "In no way does it impair the Act's usefulness as an instrument to accomplish the basic purpose of pro-

bation, namely to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts. See *Burns* v. *United States*, 287 U.S. 216, 53 S. Ct. 154, 77 L. Ed. 266. Thus Congress conferred upon the courts the power to decide in each case whether to impose a definite term of imprisonment in advance of probation or to defer the imposition of sentence, the alternative to be adopted to depend upon the character and circumstances of the individual offender."

In *United States* v. *Johnson*, *supra*, the court said:

"The probation law is founded upon humanitarian considerations, and is designed to prevent crime and restore to the ranks of upright citizens many, who through ignorance, youth, inexperience, or weakness of will, have been guilty of infractions of the law. From its very nature, however, this law can be easily abused if courts and officials concerned in its administration allow their sympathies alone to dictate their actions. Probation should not be so commonly granted that fear of punishment loses its preventive force. A tendency in this direction has already been observed, and has produced a natural reaction, so that we find that the repeal of this beneficent law is being advocated by students of criminology. If that result is to be averted, firmness and good judgment must not be subordinated to the quality of mercy in its administration. I think the true scope of the law is found in dealing with young and first offenders, where the possibility is plainly indicated that they may, in spite of a single departure from rectitude, be retained in the ranks of their law-

abiding fellow citizens. As Judge Bourquin has so well pointed out in *United States* v. *Meagher*, D.C., 36 F. 2d 824, 825, in behalf of these thoughtless young, probation may serve a useful purpose, but it should not be extended to the nature where the crime is premeditated and where committed for profit. In such cases defendants take the chances, and, when detected and convicted, they should take the consequences. First offender too often means first detected. 'To convicts treatment appropriate to their offenses * * * will go far to solve the problem of crime, father than ought else save inculcation of good morals from youth to age.'

"Probation is intended as a substitute for imprisonment in certain cases to effect a reform and avoid the contamination of time in prison, neither of which would be effective here. It is obvious that to grant probation in this case would be to depart from the purpose of the law generally and of the probation law in particular. * * *"

In *United States* v. *Nix*, *supra*, the court in commenting on the Probation Act, said:

"In extreme cases, and in cases of more or less minor offenses, probation is being granted under supervision of special volunteer probation officers, appointed for each particular case. However, the placing upon probation generally requires an extensive investigation to be made by competent officers of the government. The court should, through its own official channels, be able to secure detailed written data covering the circumstances of the offenses, the previous record, character, family history, home conditions, mental and physical conditions, habits, associations, and other important facts regarding the accused. In many cases medical certificates will be required. The law clearly contemplates, and the situation necessarily requires, that when probation is granted there must be close supervision of the probationer, and systematic reports submitted to the court.

"No hard and fast rule can be laid down as to the type of offenders who should be considered for probation. I have heretofore in several cases expressed my general views on this subject. It is my view that the Congress, in passing the Probation Law, had in mind particularly juvenile offenders, youthful offenders, first offenders and offenders whose release on probation will not endanger the public, and where there is reason to believe that the individual will make a serious effort to overcome the abnormalities and difficulties which brought him into court. In general, the offense contemplated, as I view it, would be largely those of a more or less minor character, or those induced by youth, inexperience, mental abnormalties, physical abnormalities, ignorance, poverty, superstition, jealousies, or heat of passion. Conversely, I do not think that the law, except in very rare cases, should have application to hardened, habitual criminals, to those who need to be restrained as a matter of protection to themselves and to society, or to those of mature years, of fair education, of broad experience, who have committed some very deliberate offense. A survey of the probation systems of the several states supports this view."

In *United States* v. *Durkin, supra,* the court said:

"Since the passage of the Federal Probation Act, 18 U.S.C.A. § 724 et seq., there has been a marked tendency on the part of some to treat this Act as one conferring upon the courts similar power to that conferred upon the President of the United States under Section 2, Article II of the Constitution, viz: the power of the Chief Executive to pardon and reprieve for offenses committed against the United States.

"That this is a misconception of the true purpose of the Act, and a clear abuse of judicial power, is apparent to all who properly understand the true theory upon

which the three coordinated branches of our government are founded.

"It will be admitted by all familiar with the background of probation legislation, and the authorities construing it, that it was intended to provide 'an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official', 'a means of restoring offenders who are good social risks to society,' 'to give young and new violators of law a chance to reform and escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment'.

"A study of the various Probation Acts in operation throughout the United States, including our own State, will reveal this fact. The entire history and background surrounding probation laws demonstrates clearly they were never intended to be used to defeat the ends of justice by extending their use to the hardened criminal class.

"One who has had some experience in the enforcement of the criminal laws knows there are certain persons who coldly and deliberately choose a life of crime —men and women who have decided to be enemies of organized society by making their living through lawbreaking. These persons expect the law to catch up with them and when apprehended and prosecuted for their crimes, cunningly plan to do everything in their power to defeat the ends of justice.

"There have been instances where, after putting their government to the expense of apprehension and conviction, such persons have been placed upon probation and in each of such instances the ends of justice have been defeated.

"It is a regrettable fact that courts sometimes commit innocent error in being parties to such miscarriages of justice, and, either by being unduly imposed upon or through unwarranted sympathy, allow persons to

escape the punishment they deserve. This is unfortunate. However, these are some of the things the hardened criminal considers in computing his percentage of successfully escaping the law.

"What then did the Congress of the United States mean when it provided that only when the ends of justice and the public good are subserved shall offenders against the criminal laws of the United States be placed on probation?

"It is true the Congress did not see fit, like many of the States, to incorporate specific language into the Probation Act placing a limitation on the courts as to the class of persons permitted to be released upon probation, but common sense, as well as a respect for the power granted solely to the Executive Branch of the Government, tells us the courts should not, by extending its privileges to the hardened criminal, use the Probation Act as a substitute for Executive Clemency or Presidential Pardon.

"The courts by such use of the Probation Act usurp the power of the Executive and the administration of justice comes in for deserved public criticism. Following this comes disrespect for the courts by the public generally and the hardened criminal is encouraged to continue his work of crime.

"In providing for a system of probation and authorizing the suspension of final judgment and the imposition of sentence upon persons found guilty of crimes and offenses, certain States have excluded such persons from the benefits of such legislation as were previously convicted of a crime greater than a misdemeanor. In all of the these acts will be found language which requires the court before granting probation to be satisfied that there is reasonable ground to believe the best interests of society will be subserved even though the applicant be a first offender.

"The power to place on probation, lodged in the Judicial Branch of the Government in deserving cases, is not an act of grace intended to exempt the individual

on whom it is bestowed from the punishment the law inflicts for a crime he has committed. If this were true the Probation Act would have the same legal effect, and certainly the same practical effect, as pardon.

"The power of the court to grant probation to a convict after his conviction, or after a plea of guilty, by suspending the imposition or execution of sentence, is founded upon considerations of the public good and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by a execution of the sentence. Contrary to the dramatically expressed opinion of applicant's counsel in his appeal to the sympathy of the Court it is not a personal favor nor a private act of grace from the court who happens to possess such power, and is never to take the place of clemency by the President under the Constitution."

Certain very controlling facts in this case should be considered in the light of the above quotations:

The defendant in November, 1929, entered a plea of guilty to a charge of conspiracy to violate the National Prohibition Act, 27 U.S.C.A., and paid a fine of $2,500. In March, 1934, he entered a plea of guilty to a similar charge and paid a fine of $2,000. Both charges were felonies.

Subsequent to the prohibition era the defendant and his associates conducted many food serving and liquor dispensing places in Minneapolis and other cities. For a long period of time he has been interested in slot machines, coin-operated devices and gambling places. During the greater part of his active life the defendant has been engaged in business on an extensive scale and has owned property of large value. He is experienced in modern business affairs and methods. He has employed lawyers, accountants, and experts in taxation. His liquor licenses have not always been legal. He has failed to keep proper books and records of his transactions. The greater part of his business has been done with the use of money and without using banks or the usual methods by which business affairs customarily are transacted.

Reports of law violations and on the whole a corrupt situation in the city of Minneapolis lead to an investigation by the United States of the defendant's tax liability for the period 1921 to 1933. An additional tax liability was established and the taxes paid by the defendant in 1937. During the investigation the defendant refused to cooperate with the investigators, one of the reasons for the length of the time required for the work.

In the investigation leading to the indictment in this case proper books and records were not made available to the agents of the government. Again the agents were confronted with a lack of cooperation, and a long period of time was required to ascertain the facts. Indeed, the agents of the government and the court in the trial of the case could establish the defendant's tax liability only by the "net-worth method." However, the evidence was sufficient to sustain a finding of a tax evasion for the years 1945, 1946, and 1947 of more than $32,000.

The record in this case shows that the defendant owned an interest in the Casa Blanca Cafe in the city of Minneapolis wherein a man at a late hour in the night in 1945 was shot and killed. The defendant in this case was present when the shooting occurred. Later one Shetsky was indicted for the murder of the deceased, tried twice in the state courts for the crime, once convicted and sentenced to the penitentiary at Stillwater, Minnesota. During the first trial Shetsky left the courtroom, absconded and later was found in California, thereupon was returned to Minnesota, tried a second time and acquitted. When Shetsky absconded during the first trial of his case, his bond was forfeited and it was ascertained that the defendant Banks had contributed $5,000 of a $20,000 bond.

It has been urged that the defendant is a kindly, generous individual and has made contributions to friends, worthy organizations and persons in need. The tax evasions for the years 1945, 1946, and 1947 were quite sufficient to purchase a reputation for generosity.

The attention of the court has been directed to the fact that the defendant has not been convicted of a law violation

since 1934 and that if he ever possessed criminal inclinations he has reformed and is now entitled to the consideration of a first offender. Unfortunately, this is not conclusive proof that no violations have been committed during the intervening period.

The defendant came into court for the trial of this case represented by three able, experienced lawyers who vigorously represented him at every step of the trial. A jury carefully selected under the rules of court was placed in the custody of the United States Marshal throughout the trial, segregated from public contact and influence and all newspaper articles pertaining to the trial withdrawn from the jurors. The trial covered a period of two weeks and the rights of the defendant were fully protected at all times.

[4] The defendant is about sixty-four years of age, married and without children. He is intelligent, experienced in business and has been successful and prosperous in his affairs. Unfortunately, he has conducted his business at times in violation of the laws of the federal, state and local governments, and finally was brought to the bar of justice. The court in this case is forced to the conclusion that the defendant is not the type of person who would be influenced or who would profit by the supervision of a probation officer. To extend probation in this case would be an abuse of the court's power.

[5] The government in response to the motion has urged that under the decisions of the Supreme Court of the United States and the Federal Rules of Criminal Procedure, 18 U.S.C., this court has no jurisdiction to modify or in any way reduce the sentence during the pendency of an appeal. It has been held that during the pendency of an appeal from a sentence, the District Court is without jurisdiction to modify its judgment by resentencing of the defendant. *Berman* v. *United States*, 302 U. S. 211, 58 S. Ct. 164, 82 L. Ed. 204. However, counsel for defendant has stated that the appeal in this case would be dismissed in the event probation is granted. Consequently, the decision of this question in view of the foregoing need not be determined.

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[6] It has been further urged by the government that under the Federal Rules of Criminal Procedure the motion is untimely since sentence was imposed June 23, 1952, and the motion was presented September 10, 1952, and that more than sixty days have expired since the date of sentencing. This question likewise is moot in view of the decision of the court that this is not a proper case for probation. The motion is overruled.

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[fol. 3] And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz.:

(Appearance of Counsel for Appellant.)
United States Court of Appeals
for the Eighth Circuit.

Thomas W. Banks, Appellant,
No. 14,648. vs.
United States of America.

The Clerk will enter our appearance as Counsel for the appellant.

JEROME HOFFMAN,
1220 Minnesota Building,
St. Paul 1, Minnesota.

RICHARD E. KYLE,
W-2162 First National Bank Building,
St. Paul 1, Minnesota.

JOHN W. GRAFF,
1220 Minnesota Building,
St. Paul 1, Minnesota.

HOFFMAN, DONAHUE & GRAFF,
1220 Minnesota Building,
ST. PAUL 1, MINNESOTA.

(Endorsed): Filed in U. S. Court of Appeals, Jul. 9, 1952.

[fol. 4] (Appearance of Counsel for Appellee.)

The Clerk will enter our appearances as Counsel for the Appellee.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,

MEYER H. ROTHWACKS,

MURRAY L. SCHWARTZ,
Special Assistants to The Attorney General.

(Endorsed): Filed in U. S. Court of Appeals, Feb. 24, 1953.

(Order of Submission.)

September Term, 1952.

Friday, March 13, 1953.

This cause having been called for hearing in its regular order, argument was commenced by Mr. John W. Graff for appellant, continued by Mr. Murray L. Schwartz, Special Assistant to the Attorney General, for appellee, and concluded by Mr. John W. Graff for appellant.

Thereupon, this cause was submitted to the Court on the printed record of appellant, the supplement to printed record by appellee, and the briefs of counsel filed herein.

[fol. 5] Opinion.

United States Court of Appeals
For The Eighth Circuit.

No. 14,648.

Thomas W. Banks, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the District of Minnesota.

[May 27, 1953.]

John W. Graff (Jerome Hoffmann and Richard E. Kyle were with him on the brief) for Appellant.

Murray L. Schwartz, Special Assistant to the Attorney General (H. Brian Holland, Assistant Attorney Gen-

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eral, Ellis N. Slack and Meyer H. Rothwacks, Special Assistants to the Attorney General, and Philip Neville, United States Attorney, were with him on the brief) for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and THOMAS, Circuit Judges.

THOMAS, Circuit Judge.

Thomas W. Banks was indicted, tried and convicted on three counts of an indictment which charged that he had willfully and knowingly attempted to evade his income taxes for the years 1945, 1946, and 1947, in violation of § 145(b) of the Internal Revenue Code, 26 U.S.C.A. § 145(b).[1]

The indictment was returned by the Grand Jury on January 14, 1952. On February 18, 1952, the defendant moved to dismiss the indictment and to require the taking of testimony of the members of the grand jury and the production of the transcript of the proceedings before the

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[1] 26 U.S.C.A.

Sec. 145. Penalties * * *

(b) Failure to Collect and Pay Over, or Attempt to Defeat or Evade Tax—

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

grand jury. The United States voluntarily filed two bills of particulars. A motion for a further bill of particulars was overruled. After defendant had been arraigned and entered a plea of not guilty he renewed his motion to dismiss the indictment, require the testimony of the grand jury to be taken and to produce the transcript of the testimony. Both motions were denied.

On May 20, 1952, prior to the introduction of evidence one juror was released by the trial judge on the ground that he was disqualified and an alternate juror was substituted for him.

The trial was concluded on May 30, 1952. The defendant offered no evidence but moved for a judgment of acquittal. The motion was denied, and the jury returned a verdict of guilty on each of the three counts. On June 23, 1952, the court imposed a general sentence of three years' imprisonment and a fine of $10,000. Notice of appeal was filed June 30, 1952.

The trial was commenced on May 19, 1952, and concluded on May 30th. The defendant's brief fills 115 printed pages and cites 40 cases, four text books, two statutes and two Federal Rules of Criminal Procedure. To discuss each point and each argument separately would extend this opinion to unreasonable length.

The defendant contends that the court erred: 1. In refusing to dismiss the indictment; 2. In dismissing a juror and substituting an alternate; 3. In holding that the evidence was sufficient to support the conviction on each of the three counts; 4. In denying his request for a further bill of particulars; 5. In receiving in evidence the testimony of witnesses Weinstock, O'Gordon and Kleven, together with certain exhibits; 6. In permitting the government attorney to comment prejudicially on defendant's

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failure to take the witness stand in his own defense; 7. In failing to give requested instructions and in giving certain instructions; and 8. In admitting incompetent evidence.

The defendant's first contention, namely, that the court erred in refusing to dismiss the indictment upon defendant's motion is predicated upon two subordinate contentions: first, in general, that there was no competent evidence to support a finding by the jury that the defendant willfully attempted to evade and defeat a tax; and, second, the court erred in refusing to permit the evidence before the grand jury to be made available to the defendant and his counsel.

The court properly instructed the jury that the defendant is presumed to be innocent of the crimes alleged against him in the indictment, and that the burden was upon the government to prove him guilty beyond a reasonable doubt. That burden in this case, in which a violation of § 145(b) of the Internal Revenue Code, supra, is charged, required proof (1) that a tax was due from defendant to the government for each of the years charged; (2) that the defendant attempted to evade payment of that tax; and (3) that his attempt so to evade payment was willful.

Failing to secure the cooperation of the defendant in its investigation of his income for the years involved, the government used the net worth and gross expenditures method of proving the increase in defendant's net worth from year to year. This method has been approved by this and other courts. *Leeby* v. *United States,* 8 Cir., 192 F.2d 331; *Schuermann* v. *United States,* 8 Cir., 174 F.2d 397; *Pollock* v. *United States,* 5 Cir., 202 F.2d 281; *United States* v. *Yeoman-Henderson, Inc.,* 7 Cir., 193 F.2d 867; *Gariepy* v. *United States,* 6 Cir., 189 F.2d 459; *Bell* v. *United States,* 4 Cir., 185 F.2d 302; *Brodella* v. *United States,* 6 Cir., 184

F.2d 823. The purpose of the government's evidence by this method is to show that the net worth of the taxpayer increased from year to year from a fixed starting point in amounts greater than shown on his income tax returns.

Here the government used as the starting point the net worth of defendant at the end of the year 1936 as determined from his own affidavit filed with the Bureau of Internal Revenue in 1937. Starting with the date given in that affidavit the investigators for the government found defendant's net worth at the end of the year 1936 to be $18,578.78.

The government introduced evidence to show that defendant's net worth increased thereafter so that at the close of 1944 it was $231,029.26; in 1945 it was $270,968.33; in 1946 it was $296,087.27; and in 1947 it was $322,877.34. The defendant's taxable net income as reported in his returns for the three years involved was for 1945, $20,170.11; for 1946, $27,100.99; and for 1947, $20,609.29. His taxable net income as claimed by the government was for 1945, $43,690.11; for 1946, $36,799.97; and for 1947, $41,453.07. And his federal income taxes which should have been reported and paid, but were not, were for 1945, $15,044.06; for 1946, $5,829.41; and for 1947, $12,067.55.

In arriving at these figures the government investigators compiled and analyzed statistics for the years 1936 to and including 1947 showing defendant's cash deposits in banks, his United States bonds purchased and held, his receivables, his investments in marketable stocks and bonds, stocks of operating companies, investments in real estate and other property, and his liabilities for mortgages, other loans and accounts payable; and from all such data arrived at a statement of his taxable income for all three years.

This written undisputed evidence was all introduced in evidence by the government; and it was sufficient to war-

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rant the submission of the case to the jury and to support the verdict, requiring an affirmance of the judgment, unless some other alleged error of the court requires a reversal. *Pollock* v. *United States,* 5 Cir., 202 F.2d 281.

We shall next consider defendant's objections to the grand jury proceedings. It is asserted that the court erred in refusing to permit the evidence taken before the grand jury to be made available to the defendant and to his counsel. It is the law that matters occurring before a grand jury may not be disclosed to the defendant nor to his counsel unless "permitted by the court . . ." Rule 6(e) of the Federal Rules of Criminal Procedure. Two judges in this case denied the motions of defendant calling for a transcript of the evidence taken before the grand jury. The question for decision here, therefore, is whether the rulings of these judges upon the motions so made were an abuse of discretion on their part.

The motions in question asked the court—

1. To dismiss the indictment . . .;

2. To require the members of the grand jury . . . to disclose matters occurring before such grand jury; and

3. To permit the furnishing to counsel for defendant of a stenographic report of the proceedings before the grand jury when the case against the defendant was presented.

Counsel for defendant filed with the motion his affidavit in which he avers that he had investigated the circumstances pertaining to the proposed prosecution of his client; that he had been informed that representatives of the newspapers were outside the grand jury room on the morning of January 14, 1952, when the grand jury was in session; that it appeared in one newspaper of January 15,

1952, that the grand jury was called into session at 10:00 a.m. to receive instructions; that at 10:30 a.m. that same day it commenced hearing testimony; that at 11:30 a.m. word was sent that it was ready to report; and that it made its report at 11:45 a.m. It was further averred that only one witness was called before the grand jury and that such witness was the special agent of the Intelligence Unit of the Bureau of Internal Revenue who directed the investigation of the taxpayer's affairs.

It developed that the special agent referred to was George H. McKusick who testified at the trial and whose testimony for the government is reviewed above. He testified as to the method adopted, that is the net worth method, and the findings of the investigators. Reviewing that evidence indicates that not more than an hour or at most an hour and a half would be necessary to place it before a grand jury or a petit jury in case no time was consumed by counsel's objections and arguments to the court on admissibility. The evidence was admissible not only before the grand jury but also upon the trial. We do not think the judges abused their discretion in denying the motion.

Further a trial court's exercise of discretion in denying a motion to quash or dismiss an indictment because of irregularity, if any, in grand jury proceedings is not ordinarily reviewable. *United States* v. *Holmes*, 3 Cir., 168 F.2d 888. The same rule applies to defendant's motion for a bill of particulars. *United States* v. *Rosenburgh*, 74 U.S. 580; *Wong Tai* v. *United States*, 273 U.S. 77, 82; *Knauer* v. *United States*, 8 Cir., 237 F. 8; *Stewart* v. *United States*, 8 Cir., 300 F. 769; *Bedell* v. *United States*, 8 Cir., 78 F.2d 358; *Pines* v. *United States*, 8 Cir., 123 F.2d 825; *Braatelien* v. *United States*, 8 Cir., 147 F.2d 888.

It is next contended that the court erred in receiving the testimony of one Joseph A. O'Gordon and Exhibits 70 and

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71. Reference to the testimony discloses that O'Gordon representing the defendant in the fall of 1950 discussed with representatives of the Bureau of Internal Revenue some aspects of defendant's business. The revenue officer submitted to O'Gordon a list of questions to which he requested answers. Answers of the defendant were obtained by O'Gordon on a separate sheet of paper and delivered to the revenue agent. O'Gordon was called as a witness by the government and identified the paper containing the list of questions as Exhibit 70 and the paper containing the answers as Exhibit 71. They were received in evidence over the objection of counsel for defendant.

The objection was on two grounds: first, that the lawyer-client relation existed between defendant and O'Gordon and the answers were privileged, and further they were incompetent because they were submitted as part of a proposed settlement of a civil case. O'Gordon at the time in question was not negotiating with the revenue officer as a mere attorney. He was acting as defendant's agent with a power of attorney. In that capacity he secured defendant's answers to the questions submitted and returned them to the officer. Under these circumstances they were admissible. In *American Fur Co.* v. *United States,* 2 Peters 358, 364, 27 U.S. 229, 233, the Supreme Court say: ". . . whatever an agent does or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal." The testimony objected to here was clearly admissible. *Himmelfarb* v. *United States,* 9 Cir., 175 F.2d 924. The information requested was furnished by Banks to O'Gordon for the sole purpose of giving it to McKusick in answer to McKusick's questions. O'Gordon was therefore acting within the scope of his authority as Banks' agent.

The defendant next contends that the court erred in admitting the testimony of the witness Gerald O. Kleven, an expert called by the government, and in admitting Exhibits 224, 225, 226, and 227.

Exhibit 224 is a summary of all the evidence in the case. Exhibit 226 consists of a calculation by the witness of the differences between the net income reported by the defendant in his income tax returns and the net income shown by the government's evidence, including the amount of taxes due according to each such net income and the differences between the taxes so calculated. Exhibits 225 and 227 are merely enlarged copies of exhibits 224 and 226 respectively.

That such expert testimony is admissible in cases of this character has been decided by this court and other courts frequently. See *Myres* v. *United States*, 8 Cir., 174 F.2d 329, cert. den., 338 U.S. 849; *Kirsch* v. *United States*, 8 Cir., 174 F.2d 595; *Cave* v. *United States*, 8 Cir., 159 F.2d 464, cert. den., 331 U.S. 847, rehear. den., 332 U.S. 786; *Gieckman* v. *United States*, 8 Cir., 80 F.2d 394, cert. den., 297 U.S. 709; *United States* v. *Johnson*, 319 U.S. 503.

Counsel for defendant in their brief say: "While there is an appropriate area in tax cases of this kind for expert testimony . . . there are limitations as well", and they contend that this case comes within those limitations. Attention is first directed to the case of *Kirsch* v. *United States, supra*, in which this court reversed the conviction of the taxpayer because the witness assumed without qualification that all of the defendant's deposits in a certain account represented income for tax purposes, although the government's own evidence showed that a large part of the deposits did not represent income. That is not the situation

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here. The *Kirsch* case is not in point. Other objections to these exhibits are trivial and without merit.

Defendant contends further that the court erred in admitting the testimony of Leonard H. Weinstock as to the defendant's living expenses for the years 1945, 1946, and 1947. It will be recalled that Mr. George H. McKusick was in charge of the investigation of defendant's income for the years involved. Defendant gave Weinstock a power of attorney to represent him in conferences with McKusick. McKusick furnished Weinstock a copy of his estimate of defendant's living expenses for submission to defendant. Weinstock was called as a witness to testify to the schedule of living expenses for the years in question, but claimed to have forgotten the amounts agreed upon, whereupon he was cross-examined by counsel for the government over objection of defendant's counsel. There was no error in admitting his testimony under these circumstances. It is the law that where a party, in good faith, has called a witness in his behalf and is surprised by his adverse testimony, he may, in the court's discretion, be allowed to cross-examine or to show by others, that the witness has previously made statements materially at variance with his present testimony. *Ellis* v. *United States,* 8 Cir., 138 F.2d 612; *Lewis* v. *United States,* 8 Cir., 153 F.2d 724.

The defendant complains that the court erred in dismissing a juror after he had been selected and substituting an alternate for him. The court consistent with the provisions of Rule 24 of the Federal Rules of Criminal Procedure examined the prospective jurors on their voir dire. The next morning after the jury and the alternates had been selected the court directed that the juror in question be brought before the court from the jury room when he was reminded that at the voir dire on the preceding day in

answer to a question he stated that he had his tax matters all straightened out with the government. Upon further questioning by the court it then developed that he had trouble over his tax problems with the government in 1945; that he had made returns for 1948 and 1949; that he had not paid all the taxes due for those years and that he had not made a return for 1950 or 1951, but that he had intended to do so. The court thereupon excused him from the jury and substituted an alternate juror. It is clear that on his voir dire examination the juror, whether intentionally or not, misled the court and counsel in reference to his tax troubles with the government. Under these circumstances the court did not abuse its discretion in dismissing the juror and substituting an alternate. No good reason to the contrary is suggested by counsel for defendant. His contention is that defendant was entitled to have the juror remain on the panel. But no proceedings other than the selection of the jury had been had. Under these circumstances the defendant's contention is without merit.

Another contention of defendant is that the evidence fails to disclose an affirmative willful attempt to evade and defeat a tax and hence there is no offense under 26 U.S.C. § 145(b). To support this contention the case of *Spies* v. *United States*, 317 U.S. 492, is cited. In fact the opinion in that case supports his conviction, and not his contention. That opinion, quoted by defendant in his brief, points out that a willful attempt to evade may be inferred by ". . . concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

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Here the evidence shows that defendant failed to report his entire income for taxation; that he paid only a part of the taxes which he should have paid. He held property in the names of nominees; he procured cashier's checks with which he paid for property. He did not furnish to his attorney, Mr. Weinstock, who made out his income tax returns, information necessary to make accurate returns. A part of such information which he furnished was on adding machine tape. He simply told Weinstock that the source of such income was "wagering." This, of course, referred to a part of his income only. The evidence shows that the total income included in his returns was much less than his actual income. The jury could very well find from all the testimony that defendant willfully attempted to evade and defeat his federal income taxes.

It is further charged that government attorneys prejudicially commented on the failure of defendant to take the witness stand in his own defense. No direct charge of that kind was made by government counsel. What occurred in substance was that in argument to the jury and in analyzing the government's evidence they pointed out that the government's evidence was undisputed.

No objections were made nor exceptions taken to these references at the time they occurred. Such references did not directly call the attention of the jury to the fact that defendant did not testify and no comment was made on his failure to testify further than to point out that the government's testimony was undisputed. In this situation there is no question to review. *Johnson* v. *United States*, 318 U.S. 189. Further, "The statement of counsel that certain evidence is not denied is not a violation of the safeguard vouched an accused by the law." *Baker* v. *United States*, 8 Cir., 115 F.2d 533, 544, cert. den., 312 U.S. 692.

In the cited case the court quotes with approval the statement of the court in *Lefkowitz* v. *United States*, 2 Cir., 273 F. 664, 668, that "It is only objectionable to comment upon the failure of the defendant personally to testify; and if at at the close of the whole case any given point stands uncontradicted, such lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell."

Here there was no direct reference to the failure of Banks to testify. The law was not, therefore, violated. In *Morrison* v. *United States*, 8 Cir., 6 F.2d 809, 811, Judge Booth speaking for this court said: "Comment by court and counsel that certain testimony is uncontradicted is common, oftentimes helpful, and very generally held to be without error." Citing authorities.

Counsel for defendant requested 14 numbered instructions to be given to the jury. His careless criticism of the court is illustrated by his assigned error for alleged failure to give these instructions. His first requested instruction reads:

"For proof of its case, the government relies upon circumstantial evidence. Circumstantial evidence consists of facts proved from which the jury may infer by process of reasoning certain ultimate facts. A conviction may be had upon circumstantial evidence, but to warrant a conviction on such evidence the proven facts must not only be consistent with the hypothesis of guilt and point surely and solely in the direction of guilt, and must clearly and satisfactorily exclude every other reasonable hypothesis except that of guilt."

In his brief counsel says: "Requested instruction No. 1 pertained to circumstantial evidence and while the court did state something about circumstantial evidence it refused to state that the government relied upon circumstantial evidence."

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A comparison of the requested instructions with the instructions given is convincing that the court most carefully protected the rights of the defendant and that as a whole the given instructions were more favorable to the defendant than were the requested instructions. The court gave requested instruction No. 1 on circumstantial evidence in the exact language of the request.

The whole record discloses, we think, that the defendant had a fair trial. The judgment appealed from is accordingly

Affirmed.

[fol. 19] (Judgment.)

United States Court of Appeals
for the Eighth Circuit.

September Term, 1952.

Wednesday, May 27, 1953.

Thomas W. Banks, Appellant,
No. 14,648. vs.
United States of America.

Appeal from the United States District Court
for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the Court below, Thomas W. Banks, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

May 27, 1953.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14,648

THOMAS W. BANKS,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

PETITION FOR REHEARING

A. Prefatory Statement

The appeal in this case was argued before the Court on March 13, 1953. On May 27, 1953 there was filed with the Clerk of this Court the opinion of this Court affirming the judgment of the District Court. This petition for rehearing is made pursuant to Rule 15 of this Court. In compliance with such rule there is included herein the necessary certificate that this petition is filed in good faith and is believed to be meritorious. The matters which are hereinafter set forth are deemed to be material matters of law and fact which

were inadvertently overlooked in the opinion filed on May 27, 1953.

B. The Net Worth of Appellant at the Starting Point (December 31, 1936) of the Government's Net Worth Case was not Proved.

The so-called increase in net worth method or net worth and expenditure method of proving a criminal case under 26 U.S.C. 145(b) is but a type of circumstantial evidence. It is well established that circumstantial evidence is a basis for conviction only if the evidence is inconsistent with innocence and excludes every reasonable hypothesis except that of guilt. It has been held with uniformity that where the government relies on the increase in net worth plus expenditures method to prove unreported net income, the case fails if the basic premise, namely, that the net worth of the appellant at the starting point (December 31, 1936) is not correct. The opinion of the Court (page 4 second complete paragraph) recognizes that the government used the so-called net worth and expenditures method, and recognizes that the starting point of the government's net worth case was December 31, 1936 and states that the government investigators found appellant's net worth at the end of the year 1936 to be the sum of $18,578.78. We submit that the opinion inadvertently overlooks the fact that the government failed to establish the necessary basic premise that the so-called starting point, the net worth as of December 31, 1936, was correct. It is true, as the opinion of the Court states, that the government used as its starting point the net worth of the appellant as determined by it from the appellant's affidavit (Ex. 33) and the record does not reflect that anything

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else but such affidavit was used to determine such starting point. The affidavit of a taxpayer can only be used as the exclusive means to determine the net worth of such taxpayer as of a certain date if such affidavit lists all assets and liabilities of such taxpayer as of such date. If the affidavit does not contain all the assets and liabilities of a taxpayer as of a certain date, then such affidavit alone is insufficient upon which to base an accurate determination of a taxpayer's net worth as of such date. A critical examination of appellant's affidavit of July 2, 1937 discloses it has at least the following deficiencies which prevent an accurate determination of the appellant's net worth as of December 31, 1936:

1. It does not purport to include or show all of the assets of the appellant or of his wife. Nowhere in the affidavit is there a statement to that effect.

2. There is no statement in the affidavit regarding cash on hand of the appellant or of his wife. Mr. McKusick testified (R. 398) that he did not know how much cash the taxpayer or his wife had on hand July 2, 1937 or on December 31, 1947. Mr. Kleven testified there was no exhibit in evidence which showed the amount of cash the appellant had in his possession on December 31, 1936. (R. 536).

3. There is a reference to the existence of a safety deposit box in a bank in Minneapolis standing in the name of the appellant and his wife but there is no statement whatsoever regarding the contents of the box. Mr. McKusick on direct examination stated (R. 331) that he looked for safety deposit boxes in the name of the appellant and found some but did not examine the contents.

4. There is no statement in the affidavit about the stocks listed in the statement attached to the affidavit concerning the cost of the stocks or whether they constitute all of the stocks owned by the appellant. The

statement is that he had these stocks in his possession and they are worthless.

5. Nothing is contained in the affidavit as to loans owing by third persons to the appellant or his wife.

6. The Bureau of Internal Revenue knew that the appellant had the sum of $7,800 in September, 1937, because the appellant paid them that amount of money at that time (R. 434). Notwithstanding the possession of this knowledge the government refused to give appellant credit for having any cash in the beginning net worth.

The foregoing demonstrates that the affidavit did not list all the assets and liabilities of the appellant. Since the affidavit did not list all the assets and liabilities of the appellant as of a certain date it cannot be used to accurately determine the appellant's net worth as of such date. Since it is necessary to prove a correct starting point as part of an entire plan to prove unreported income through increases in net worth, the proof fails to meet the necessary standard of proof and the case fails because of the insufficiency of the evidence to support the conviction.

C. Exhibit 224 is not a Summary of all the Evidence in the Case.

On page 8 of the Court's opinion the following statement is made: "Exhibit 224 is a summary of all the evidence in the case". We respectfully submit that Exhibit 224 is *not* a summary of all the evidence in the case and contend that the record demonstrates that it is not a summary of all the evidence in the case. The direct testimony and cross-examination of Gerald O. Kleven pertaining to Exhibit 224 is in the record at pages 453-569.

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The following portion of the record shows that it was the position of the government and of the witness that as an expert witness he had the right to reject that part of the government's testimony which was desirable and accept such parts as were desirable.

Record p. 453-454:

Q. From the exhibits in this case and from the oral testimony adduced here in this court room as to facts, are you able to make an analysis and a summary under the net worth method to show the income of this defendant from the years 1936, 1941, '42, '43, '44, '45, '46 and '47?

A. Yes.

Q. Have you reduced such a summary to chart form?

A. Yes, we have.

Q. Mr. Kleven, showing you Government's Exhibit 224, can you tell me what that is?

A. That is a typewritten copy of the figures that I prepared of the net worth summary.

Record p. 459-461:

Mr. Hoffmann: May we say one thing at this time, Your Honor?

The Court: Yes.

Mr. Hoffmann: I trust the Court, prior to its statement now completed as part of the record, was mindful of this witness' testimony in response to the question of the District Attorney as to what the computations of this witness, as represented by 224, were based upon. The record, I am certain, Your Honor, will disclose the answer of the witness to have been that his computations, as now reduced to 224 and as proposed to be reflected by the chart that the District Attorney refers to, were based upon, he said, "All of the Exhibits in this case, and, most important, Your Honor, "all of the testimony

in this case"—which means up to the moment of his so speaking. He said that he was in the court room all of the time during the course of this trial; that he took into consideration all of the testimony adduced up to the time of his speaking, and then, upon a question put to him by Mr. Graff, it develops that the chart here referred to as Exhibit 224 was prepared last Friday night, May 23rd, and that, in the main, Your Honor, the witness' testimony went on to relate that it was prepared by him a long time prior to the commencement of this trial, but in effect as to some minor alterations, had only those changes as of the time of last Friday night. Your Honor, the witness testified that he made the exhibit in 1951, and the Government's offer, simply and briefly, our point is, is based upon this witness' statement in response to the foundation questions that this exhibit reflects his understanding and acceptance and interpretation of all of the evidence in this case.

Mr. Landrum: May I say a word, Your Honor?

The Court: Yes.

Mr. Landrum: Counsel has misquoted just one little word. That little word was it was based upon the testimony as to 'facts' in this case,—facts. Testimony as to facts is what the witness said.

Mr. Hoffmann: Your Honor, I shall be glad in behalf of the defendant to have the District Attorney in behalf of the Government state that is the basis of their offer as to foundation of this exhibit, because now it is completely obvious that they are asking this witness to interpret testimony and determine what part of the testimony constitutes a fact and what part is rejectable to him. It is, therefore, an invasion of the province of the jury.

Mr. Landrum: I do not care to argue it any more.

Mr. Kleven testified (R. 533) that in preparing Exhibit 224 he had the records of prior revenue agents who had completed a report on the appellant covering the years 1920 to 1923 and which was on a net worth basis. He stated he took the ending net worth as shown in that report and worked it down to the end of the three years. The records of such prior revenue agents were not introduced in evidence in this case and yet it is apparent that Mr. Kleven relied upon such report to make up Exhibit 224. Mr. Kleven testified further that he disregarded the dates of acquisition of stocks shown on Exhibit 4 (the 1940 tax return) because of something he read in a special agent's report which satisfied him that the stock was not owned in 1935 as stated in the 1940 return. In explanation he stated he accepted the conclusions of the agents. The conclusions and reports of these agents were not introduced in evidence in Court and yet such conclusions and reports were relied upon by Mr. Kleven in making up Exhibit 224. Mr. Weinstock testified concerning the so-called trust account but such testimony was rejected entirely by Mr. Kleven in making up Exhibit 224 because as Mr. Kleven stated it, "he testified erroneously" (R. 562). The only evidence in the case was introduced by the government and the only conceivable area in which an expert could testify was on the basis of all evidence introduced into the case. There is neither reason or authority for the support of the proposition that an expert may give an opinion as expressed on Exhibit 224 based upon the acceptance of some testimony and based upon the rejection of other testimony and based upon reports and conclusions not in evidence in the case. That is precisely what Mr. Kleven did in preparing Exhibit 224 and that is why the statement in the opinion is in error. The error complained of is of course,

that Mr. Kleven by his testimony and by the use of Exhibit 224, unlawfully invaded the province of the jury. What has been said about Exhibit 224 is equally applicable to Exhibit 225, the very large exhibit.

D. Evidence Insufficient Because Assets of Wife of Appellant were Treated as Assets of Appellant.

While this point was included in the brief and orally argued there is nothing contained in the opinion on this point and it is assumed that the omission to rule on this point was inadvertent. Beginning with the government's starting point for its net worth case and ending with the amount of the increase in net worth for the last year the government included assets of the wife of the appellant in the assets of appellant. It was apparently assumed that everything that belonged to Rita Banks belonged to the appellant notwithstanding the fact that she made her own tax returns and had her own separate property. It is, of course, elementary that in attempting to ascertain the beginning net worth and the net worth increase from year to year for a person there can only be used the property of such person. If it is the claim of the government that the property and income of Rita Banks is the property and income of the appellant, then such contention must be proved by competent evidence which was not done in this case. If property is acquired and placed in the name of husband and wife either as joint tenants or as tenants in common it is generally regarded as being a gift at that time of an undivided one-half interest in the property. If property is acquired by gift, the income from such property is, of course, the property of the donee of the gift. No effort was made to differentiate be-

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tween the property of the appellant and his wife and no effort was made to differentiate between the income of the appellant and the income of his wife. All income and property were lumped together as if all were the income and property of the appellant. The result of this lumping is, of course, that as far as the appellant was concerned the beginning net worth, the so-called corrected net income, the increases in net worth, and the computed tax deficiency were all incorrect. There was no effort made to establish what belonged to the wife and there was no effort made to subtract what belonged to the wife from that of the whole.

The method employed by the government sought to prove unreported income by the increase in net worth and expenditures method, which is but a type of circumstantial evidence. The inclusion of the wife's income and property made impossible the use of the circumstantial evidence rule to sustain a conviction because it did not foreclose every other reasonable hypothesis except that of guilt.

E. The Grand Jury Proceedings.

It was contended in appellant's original brief (pp. 13-32) that the indictment in this case was not obtained on evidence that was sufficient and in fact was based upon hearsay and incompetent evidence. The court's opinion on page 7 states that a review of Mr. McKusick's testimony "indicates that not more than an hour or at most an hour and a half would be necessary to place it before a grand or a petit jury - - -". We believe this statement to be inadvertent for several reasons. It assumes that Mr. McKusick testified to exactly the same things before the grand jury that he did before the petit jury. There is absolutely no basis for this

assumption in the record. This statement further assumes that if Mr. McKusick had so testified before the grand jury that there would have been sufficient evidence to support an indictment. We submit this assumption is also false. If you took only Mr. McKusick's testimony upon the trial, a prima facie case would not have been made against the appellant. At the trial there were over forty witnesses who testified to facts and produced and identified records which facts could not have been testified to by Mr. McKusick and which records could not have been identified by Mr. McKusick unless it was by means of hearsay and incompetent testimony. It is a singular fact that the government has never denied that the indictment was obtained as alleged by the appellant. The Court states in its opinion that a trial Court's exercise of discretion in denying a motion to quash an indictment is not ordinarily reviewable. The point that complaint was made about in this Court was that the trial Court refused to permit appellant to call witnesses to prove his contention, if the trial Court did not accept as facts the allegations in appellant's motions. (R. 18, 19, 20, 56 and 57).

On the other hand, if the Court did accept as facts the allegations in appellant's motions, then it was error not to quash the indictment.

F. Answers Furnished by O'Gordon.

On page 8 of the Court's opinion in discussing the answers of O'Gordon on Exhibit 71 the following statement is made: "The information requested was furnished by Banks to O'Gordon for the sole purpose of giving it to McKusick in answer to McKusick's questions". We believe this statement to be inadvertent because there is nothing in the record

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to show that the answers given by O'Gordon were furnished by him by the appellant. The record fails to show that the appellant ever saw, furnished or agreed to the answers on Exhibit 71. For this reason we contended that Exhibit 71 was not properly admissible against appellant and its admission into evidence was error.

G. Weinstock's Testimony as to Living Expenses was not Substantive Testimony.

It was necessary as a part of the government's case to prove the living expenses of the appellant. While the indictment in this case was returned on January 14, 1952, (R. 1) Mr. Weinstock was questioned before the Grand Jury on May 2, 1952 (R. 271) about living expenses of the appellant. At the trial upon a claim of surprise on the part of the government, the government was permitted to cross-examine Mr. Weinstock. We contended that under the circumstances that a proper basis for a claim of surprise and the allowance of cross-examination of their own witness should not have been permitted. This Court's opinion indicated that the cross-examination was permissible under the circumstances. It was the important part of our point that the testimony elicited by the government by its cross-examination of Mr. Weinstock was not substantive evidence in the case. We believe that the Court inadvertently omitted any consideration of such point. We believe it to be a settled proposition of law that testimony elicited by cross-examination of one's own witness under a claim of surprise about a prior contradictory statement is not substantive evidence. Mr. Weinstock's testimony. therefore, is not substantive testimony in the case and without it the government has not made out a prima facie case.

H. Requested Instruction Number One.

On page 13 of the Court's opinion there is discussed the instructions requested to be given by the appellant. In its opinion the Court states: "His careless criticism of the Court is illustrated by his assigned error for alleged failure to give these instructions". The opinion then states after quoting the requested instruction and quoting the assigned error at the end of the page: "The Court gave requested instruction No. 1 on circumstantial evidence in the exact language of the request". We believe this to be inadvertent because the Court did not give requested instruction number 1 in the exact language of the request. The requested instruction number one is contained in the record at page 579-580. It will be noted that the first sentence of the requested instruction is entirely missing from the instruction as given. It was and still is our position that the Court should have given the instruction that the government's case was based upon circumstantial evidence and we submit the request therefor was proper. In *Pollock v. United States*, 202 F. 2d 281, 5 C. A. cited by the Court on page 5 of its opinion a part of the instructions of the trial Court in that case to the jury are contained in the footnote on page 285. The reviewing Court in that case commends the trial Court on its instructions which include a statement that the case is based upon circumstantial evidence. We trust that the foregoing explanation is sufficient to show that our criticism of the trial Court was not "careless" as indicated by the Court in its opinion. In substance we are of the position that where you have circumstantial evidence in a case the trial Court should so advise the jury and then give them the rule to apply to the circumstantial evidence.

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I. Conclusion.

We respectfully submit that these are substantial and material matters of law and fact that should receive further consideration by this Court. We sincerely believe that additional hearing and argument before the Court will establish that the judgment in this case should be reversed. We, therefore, respectfully submit our request for a rehearing.

JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant

J. Certificate of Counsel.

We hereby certify, in compliance with Rule 15(b) of this Court, that this petition is filed in good faith and is believed to be meritorious.

Respectfully submitted,

JEROME HOFFMANN
RICHARD E. KYLE
JOHN W. GRAFF
Attorneys for Appellant

(Endorsed): Filed in U. S. Court of Appeals, Jun. 9, 1953.

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[fol. 33] (Order denying Petition of Appellant for Rehearing.)

September Term, 1952.

Tuesday, June 16, 1953.

The Court has considered the petition for Rehearing filed by Appellant herein and It is Now Here Ordered that said Petition be and is hereby denied.

June 16, 1953.

(Motion of Appellant for Stay of Mandate.)

The above-named appellant hereby respectfully moves the Court for an order staying the mandate for a period of at least thirty (30) days in the above-captioned matter pending application by the appellant to the United States Supreme Court for a writ of certiorari.

HOFFMANN, DONAHUE
& GRAFF,

JEROME HOFFMANN,

RICHARD E. KYLE,

JOHN W. GRAFF,
Attorneys for Appellant.

(Endorsed): Filed in U. S. Court of Appeals, Jun. 20, 1953.

[fol. 34] (Order Staying Issuance of Mandate.)

September Term, 1952.

Thursday, June 25, 1953.

On Consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of

this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 25, 1953.

[fol. 35] (Clerk's Certificate.)

United States Court of Appeals
for the Eighth Circuit.

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains record printed by appellant and supplemental record printed by appellee on which the appeal from the United States District Court for the District of Minnesota was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals for the Eighth Circuit, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Court of Appeals wherein Thomas W. Banks was Appellant and the United States of America was Appellee, No. 14,648.

And I do further certify that there was filed on February 7, 1953, and submitted to said Court of Appeals, in said cause, volume containing Index to and Description of Exhibits together with Reproduction of Certain Exhibits, and said volume is also transmitted to the Supreme Court of the United States for filing in connection with petition for writ of certiorari.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 1st day of July, A. D. 1953.

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

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SUPREME COURT OF THE UNITED STATES

No. 859, October Term, 1952.

THOMAS W. BANKS,

Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 14, 1953.

s/ Tom Clark
Associate Justice of the Supreme Court of the United States

Dated this 7th day of July, 1953.

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IN THE

Supreme Court of the United States

October Term 1953

No. ....

THOMAS W. BANKS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Your petitioner, Thomas W. Banks, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on May 27, 1953.

OPINIONS BELOW

District Judge Donovan's memorandum opinion attached to his order deferring until the trial of the general issue the determination of petitioner's motion to dismiss the indictment (R. 21-22), is not reported. Likewise, the oral statements of District Judge Bell, who presided at the trial, overruling petitioner's motion to dismiss the indictment (R. 57-58) and overruling the motion for a new trial

(R. 631-632) are not reported. The opinion of the Court of Appeals affirming the judgment of the District Court (C.A. Proceedings 5-17) is reported at 204 F. 2d 666.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1953 (C.A. Proceedings 17-18). A petition for rehearing, filed June 9, 1953 (C.A. Proceedings 19-31), was denied on June 16, 1953 (C.A. Proceedings 33). By an order entered July 7, 1953 by Mr. Justice Clark, the time for filing a petition for writ of certiorari was extended to and including August 14, 1953. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

After the return of an indictment against him for income tax evasion in three counts covering the years 1945, 1946, and 1947 respectively, petitioner moved to dismiss the indictment on the grounds that there was not sufficient legal evidence before the grand jury to warrant and sustain the return of the indictment and that it was obtained in violation of the Constitution. Petitioner further moved to require a disclosure of matters occurring before the grand jury and to permit the furnishing to his counsel of a stenographic report of the proceedings before the grand jury. The affidavit in support of the motion set forth facts to show that it was impossible for proper legal evidence supporting the indictment to have been presented to the grand jury, as only a single witness had testified, for less than one hour, the government made no claim of any specific unreported income capable of identification in the prosecution years, but instead its case was a so-called "net worth" case with a starting point based on an affidavit executed by the taxpayer in July 1937, seven and one-half years before the beginning of the first prosecution year, and the petitioner denied making any confessions or admissions against interest. Although the government did not file any

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counter affidavit or make a showing of any kind in opposition to the motion or the supporting affidavit, the district court denied the motion, rejecting even petitioner's request that the court itself examine the transcript of the testimony before the grand jury. The court of appeals affirmed. On these facts there is raised the question

1. Whether an indictment so found was an "indictment of a grand jury" within the meaning of the Fifth Amendment, so that petitioner was held to answer for an infamous crime in a manner other than as required by the Fifth Amendment.

There are also presented in this case the further questions

2. Whether the powers of attorney given by petitioner for representation before the Treasury Department in this case authorized his agents, in the course of their negotiations with government representatives and long after the alleged offenses were committed, to make admissions which would be binding on the taxpayer in a criminal prosecution based on the alleged offenses.

3. Where, in a tax evasion prosecution based on evidence of increase in net worth, an expert witness for the government is permitted to testify on the basis of his analysis of the evidence that the defendant had unreported net income in given amounts in the prosecution years and the amount of tax due thereon, whether charts setting forth the witness' conclusions were properly received in evidence as exhibits.

4. Whether petitioner was properly convicted of income tax evasion, prosecuted on the increase in net worth theory, with a starting point eight years before the beginning of the first prosecution year, where the trial court refused requested instructions as to the essential elements of a net worth case, that the gov-

ernment must prove beyond a reasonable doubt petitioner's net worth for each year from its starting point through the end of the last prosecution year, and that the government relied upon circumstantial evidence for proof of its case.

CONSTITUTIONAL AMENDMENT, RULE, AND REGULATIONS INVOLVED

The Fifth Amendment, Rule 6(e) of the Federal Rules of Criminal Procedure, and the pertinent provisions of the Conference and Practice Requirements, Bureau of Internal Revenue, are printed in Appendix A, *infra*, pp. 24-27.

STATEMENT

An indictment was returned against petitioner in the United States District Court for the District of Minnesota on January 14, 1952 charging in three counts a willful attempt to defeat and evade income tax for the years 1945, 1946, and 1947, respectively, in violation of § 145(b) of the Internal Revenue Code, 26 U. S. C. § 145 (b) (R. 1-3). Before being arraigned and pleading to the indictment, petitioner filed a motion to dismiss the indictment on the grounds, among others, that there was no sufficient legal evidence before such grand jury to sustain and warrant the return of the indictment and that it was obtained in violation of law and of the Constitution of the United States (R. 3-4). Petitioner further moved to require a disclosure of matters occurring before the grand jury and to permit the furnishing to his counsel of a stenographic report of the proceedings before the grand jury (R. 4-5).

These motions were supported by an affidavit of one of petitioner's attorneys alleging in substance the following facts: that affiant had discussed the proposed tax case against petitioner with responsible counsel for the Bureau of Internal Revenue and the Department of Justice; that at the time each such counsel had before him a copy of the investigative report of the Internal Revenue Intelligence Unit; that each such counsel advised affiant that the proposed case against petitioner was a so-called "net worth"

case, that there was no claim in the report of any specific unreported income capable of identification which was not included in petitioner's tax returns for the indictment years 1945, 1946, and 1947, and that the government's starting point for its so-called "net worth" case was an affidavit executed by the petitioner in July 1937; that petitioner denied making a confession or admission against interest; that information concerning the proposed indictment of petitioner was furnished to the local newspapers at least three to four days in advance of the meeting of the grand jury; that these newspapers were advised that the grand jury would convene on the morning of January 14, 1952 and that before noon an indictment would be obtained against petitioner; that representatives of the newspapers were in the court room when six new members of the grand jury were sworn in and when the grand jury received its instructions, they were also outside the grand jury room and were able to note the time the grand jury began its session on January 14, 1952, as well as how long it was in session and who testified before it that morning; that it appears from the Minneapolis Morning Tribune for January 15, 1952 that the grand jury was called into session at 10:00 A.M. to receive instructions from Judge Donovan, that at 10:30 A.M. the grand jury started hearing testimony, that at 11:30 A.M. the grand jury sent word that it was ready to make a partial report to the court, and that at 11:45 A.M. the grand jury returned into court the indictment against petitioner; that it appears from the Minneapolis Star for January 15, 1952 that the United States Attorney and an assistant United States Attorney stated that only one witness was called before the grand jury in connection with the presentation of the case against petitioner, that witness being the special agent of the B. I. R. Intelligence Unit who directed the investigation into petitioner's affairs;[1] that from the foregoing the conclusion

[1] During the hearings on the motion it developed that this witness was special agent George McKusick (R. 19; C. A. Proceedings 10).

is inescapable that the total time which could have been spent in presenting evidence to the grand jury had to be less than one hour, since presumably the grand jury spent some time in deliberating (R. 5-9).

Affiant submitted as a matter of common sense that it is a physical and mental impossibility for one man in less than one hour to present properly to a grand jury a "net worth" tax evasion case for the years 1945-46-47 when the starting point is an affidavit executed in 1937, necessitating a showing of petitioner's net worth at the close of each of the calendar years 1937 to 1947 inclusive, what portion of any increase in his net worth at the close of each of those years represented taxable income and what portion represented non-taxable income, what amounts were reasonably expended by petitioner as living expenses in each of those years, that there was a substantial deficiency in the tax paid for the indictment years, and that the substantial deficiency claimed was the result of a willful attempt to defeat and evade income tax (R. 9-11).

The government did not file any counter-affidavit or make any showing to controvert the allegations in the affidavit supporting the motion to dismiss (R. 53). The motion was heard by Judge Donovan who, after hearing argument and receiving briefs, deferred determination thereof until the trial of the general issue (R. 21), although in a memorandum attached to the order the court observed (R. 22):

> • • • Removal of the veil of secrecy from what transpired in the presence of [the grand jury] in my opinion is not warranted at this stage of the proceeding. Granting that the indictment must be based on competent evidence, I am not impressed that the time consumed in the presentation of evidence was too little. In the presentation of evidence before the jury, time is a relative matter.

When the case came on for trial there was further argument of the motion (R. 44-57), after which Judge Bell, who

was sitting for the trial of the case, ruled on the motion in the following language (R. 58):

> * * * I dislike to go into a case if there is some substantial showing that a matter of this kind should have preliminary consideration, and yet this case has been set for trial for six or seven weeks, even [sic] since I returned and have had something to do with it. A jury has been ordered here to start the trial of this case and I am inclined to think that this motion should be overruled and that the trial should be commenced. That will be the order of the Court.

In the course of the trial which followed Joseph A. O'Gordon, an attorney who had represented petitioner in 1950 (R. 200), when called as a government witness identified the power of attorney petitioner had executed authorizing O'Gordon to represent him before the Bureau of Internal Revenue (Govt. Ex. 34, R. 204, 205; Appendix B, *infra*, p. 28). A list of questions concerning petitioner's affairs, submitted to O'Gordon, together with the answers submitted by O'Gordon to special agent George H. McKusick, were also put in evidence over petitioner's objection (Govt. Exs. 70 and 71, R. 204-205).

Later McKusick, the special agent who investigated petitioner's tax returns (R. 189), was asked concerning an agreement or some agreements said to have been entered into by O'Gordon and Leonard H. Weinstock as to the amount of petitioner's living expenses during the years 1937 through 1947 (R. 345-346, 350-352). Weinstock, the public accountant who prepared the tax returns of petitioner and his wife from 1942 to 1951 (R. 264, 265), had a power of attorney executed April 5, 1951 to represent petitioner "in connection with all tax returns which have been filed with any department of the United States Government" (Govt. Ex. 35; Appendix B, *infra*, p. 29). Petitioner's counsel objected to such questions on the ground that these powers of attorney to O'Gordon and Weinstock

did not authorize them to make admissions which would be binding on petitioner in a criminal proceeding (R. 346-347, 352), but these objections were overruled and McKusick was permitted to testify to agreements made at different times by O'Gordon and Weinstock as to petitioner's living expenses, as follows (R. 349, 353):

	O'Gordon	Weinstock
1937.....		$ 6,000
1938.....		6,000
1939.....		6,000
1940.....	$ 6,000	6,000
1941.....	6,000	6,000
1942.....	6,000	10,000
1943.....	6,000	10,000
1944.....	9,000	10,000
1945.....	9,000	10,000
1946.....	15,000	12,000
1947.....	15,000	12,000

Weinstock himself had been called as a witness for the government and testified to having agreed with the government agents as to petitioner's maximum living expenses for the years 1942 through 1947 (R. 269). When he could not recall the amounts agreed upon (R. 269-270) he was, over petitioner's objection, cross-examined by the government for purposes of impeachment concerning testimony he had given before the grand jury on May 2, 1952, three and a half months after the return of the indictment in this case (R. 270-274).[2] The gist of his testimony before the grand jury was that Weinstock had agreed with the government agents that $10,000 per year for 1942-1945 and $12,000 per year for 1946-1947 should be considered as petitioner's

[2] Calling Weinstock before the grand jury long after the return of the indictment in this case was obviously a device employed by the government to question a presumably hostile witness in preparation for trial, rather than a bona fide investigation of other matters (see R. 271-272). We submit that such conduct on the part of the government is highly irregular and that it is a significant part of the context in which the questions raised in this petition concerning other aspects of the handling of this case should be considered.

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living expense, that before making this agreement he (Weinstock) had discussed the subject with petitioner, who was unwilling to accept these figures because he "thought they were too high in the later years" but "finally agreed it would be all right" (R. 274). On cross-examination by the defense Weinstock testified all the work he had done on the case had been with the thought in mind of bringing about a civil settlement (R. 277). He said that was his purpose in submitting the living expense figures to McKusick (R. 278). While Weinstock did not inform McKusick that this was his purpose and had never had any definite understanding with McKusick that the living expenses were agreed to in order to work out a civil settlement (R. 277, 278), McKusick himself had said the purpose of the living expenses agreement "was to reach a point of settling the case" (R. 276) or "to wind up the case" (R. 278). McKusick never denied making these statements, although he did deny that it had been his understanding that the purpose of an earlier conference with petitioner's representatives was to settle the civil tax liability (R. 394).

In connection with the examination of one of its last witnesses, Gerald O. Kleven, the government put into evidence over petitioner's objection a six-page document (Govt. Ex. 224, R. 454, 521) purporting to be "an analysis and a summary under the net worth method to show the income of [petitioner] from the years 1936, 1941, '42, '43, '44, '45, '46, and '47" prepared by Kleven from "the exhibits in this case and from the oral testimony adduced * * * as to facts" (R. 454). The years 1937 through 1940 are not included in Exhibit 224 because sufficient evidence was not found to produce an accurate net worth for those year-ends (R. 464). Also put into evidence over objection was a chart (Govt. Ex. 226, R. 522-524) prepared by Kleven purporting to show for the three prosecution years the taxable net income reported by petitioner, the taxable net income as claimed by the government, the income taxes as

reported, and the taxes the government alleges should have been but were not reported.[3]

The principal objection to the admission of these exhibits was that it invaded the province of the jury in that they reflected Kleven's understanding and interpretation of all the evidence in the case and were based upon his acceptance of part of the evidence and his rejection of part (R. 459-460, 523-524). The trial judge was under the impression that the admissibility of such exhibits had been sustained by this Court (R. 459).

Petitioner rested without putting on any evidence (R. 578), and his motion for acquittal made then and also earlier at the close of the government's case was denied (R. 576-578, 579).

Petitioner's requested instruction No. 1 dealt with circumstantial evidence and began with this sentence (R. 579): "For proof of its case, the government relies upon circumstantial evidence." The court gave the instruction on circumstantial evidence substantially in the language submitted by petitioner, except that the opening sentence quoted above was omitted (cf. R. 579-580, 621). Among petitioner's requested instructions which the court refused (R. 623) was request No. 11, as follows (R. 582):

> In this case the government relies on a claimed increase in the defendant's net worth in the years 1945, 1946 and 1947 to prove claimed unreported income during said years. The government's case must fail if the claimed net worth of the defendant at the starting point of the periods in question is not correct and has not been established beyond a reasonable doubt. A correct starting point must include all of the defendant's assets at that time as well as all of his liabilities. It is also incumbent upon the government to exclude any reasonable probability that the increase in net worth

---

[3] For the purpose of explaining Exs. 224 and 226 to the jury, huge enlargements thereof were put into evidence as Govt. Exs. 225 and 227 (R. 457, 461, 521, 524-525). Because of their size and because they are merely duplicates, Exs. 225 and 227 were by stipulation omitted from the exhibits certified to this Court.

is attributable to capital assets or accumulations by the taxpayer in periods prior to the starting point of the net worth period in question.

In addition to establishing a correct starting point, it is incumbent upon the government to prove beyond a reasonable doubt the defendant's net worth for each year from the starting point up to and including the year 1947.

The jury returned a verdict of guilty on all three counts, and petitioner was given a general sentence of imprisonment for three years and a fine of $10,000 (R. 628, 634). On appeal the Court of Appeals held that there was no abuse of discretion in the denial of the motion to dismiss the indictment, adding that a trial court's exercise of discretion in such a matter "is not ordinarily reviewable" (C. A. Proceedings 9-10). The Court of Appeals likewise sustained the ruling of the trial court that the powers of attorney from petitioner to O'Gordon and Weinstock authorized them to make admissions which would be binding on petitioner in a criminal prosecution (C. A. Proceedings 11, 13), and upheld the admissibility of Exhibits 224 and 225, Kleven's summary and analysis of the evidence, and Exhibits 226 and 227, Kleven's calculation of the income taxes which should have been paid on the basis of the taxable net income on his summary and analysis (C. A. Proceedings 12-13). The Court of Appeals also approved the instructions given by the trial court, expressing the view that "as a whole the given instructions were more favorable to the defendant than were the requested instructions" (C. A. Proceedings 16-17).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In failing to hold that there was not a proper exercise of discretion by the trial court in denying the motion to dismiss the indictment, to require a disclosure of matters occurring before the grand jury, and to permit the furnish-

ing to petitioner's counsel of a transcript of the proceedings before the grand jury.

2. In holding that there was no abuse of discretion on the part of the trial court in the denial of the motion referred to above.

3. In failing to hold that the indictment herein was not an "indictment of a grand jury" within the meaning of the Fifth Amendment.

4. In holding that the powers of attorney given by petitioner authorized his agents to make admissions which would be binding on him in a criminal prosecution.

5. In holding that charts setting forth a summary and analysis of the evidence and a calculation of alleged unreported income, prepared by a witness testifying for the prosecution as an expert in an income tax evasion case, are admissible in evidence as exhibits.

6. In holding that the trial court properly refused petitioner's request for a charge that the government relies upon circumstantial evidence for proof of its case.

7. In holding that the trial court properly refused petitioner's requested instruction No. 11 covering the elements which must be established where income tax evasion is sought to be proved by the "net worth" method.

8. In affirming the judgment of the District Court.

REASONS FOR GRANTING WRIT

1. In *United States* v. *Johnson*, 319 U. S. 503, this Court said (319 U. S. at 507):

> Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance.
> * * *

Since, in our view, some of the principal vices of the decision below stem indirectly from rulings of this Court in the *Johnson* case, and since the impact of the decision below on the operation of the grand jury system is potentially much more far-reaching than the decision reviewed by this Court in the *Johnson* case, we maintain that the proper administration of federal criminal justice requires a review here.

(a) The decision below offers the government the tempting opportunity to take advantage of the traditional secrecy of grand jury proceedings to obtain indictments in difficult income tax evasion cases in disregard of the requirements of the Fifth Amendment. This can best be understood by noting the sharp contrast on the facts betwen the present case and the *Johnson* case. Although both were tax evasion prosecutions of an exceedingly complex nature,[4] with the government's evidence of unreported income being entirely circumstantial, in the *Johnson* case the grand jury's investigation lasted almost four months, which the government said was essential, while here the grand jury took evidence for less than one hour, which the government insists was ample.

We believe that this surprising contrast results indirectly from this Court's ruling in the *Johnson* case that an expert witness may testify to the defendant's income and expenditures during the indictment years, i.e., the ultimate facts to be determined by the jury, basing such testimony on his own analysis of the evidence. 319 U. S. at 519-520. Opinion evidence as to the guilt of an accused having been approved

[4] In the *Johnson* case the Circuit Court of Appeals held the indictment void as having been returned by an illegally constituted grand jury. This conclusion was reached on the court's construction of the order authorizing the grand jury to continue to sit for a further term as permitting the grand jury to finish not merely investigations begun during its original term but also investigations begun during an intervening term. The government's petition for certiorari dwelt on the length of time required for proper investigation of tax evasion cases by the grand jury and complained that "[t]he ruling of the court below substantially impedes the carrying out of an essential function of grand juries, the thorough investigation of complex cases" (Petition, No. 4, October Term 1942, p. 16).

for use before the petit jury, it would be illogical not to assume that such evidence was being used before the grand jury as well. And when, as here, the grand jury returns an indictment in a complex tax case after hearing testimony of a single witness for less than one hour, common sense tells us that this must have been done by permitting a single "expert" to give a quick summary of what the government's proposed witnesses would testify to and his opinion as to what the proposed documentary evidence will tend to prove. Only in this way could there have been such timetable accuracy in scheduling, with the newspapers informed three or four days in advance that the grand jury would meet on the morning of a certain day and by noon return an indictment against petitioner (R. 8).

Nor can it be said that the decision here turns on the facts of this case and hence would have no bearing on other cases. The showing made by petitioner here is as strong as an accused could reasonably be expected to ever make in any case. Although McKusick, the witness who testified before the grand jury, was an important witness at the trial, there were 45 other witnesses at the trial also, and obviously the summary of the evidence set forth in the opinion of the court below is a summary of *all* the evidence and not merely of McKusick's testimony (C. A. Proceedings 8, 10). Moreover, the court below made no mention of the more than 200 exhibits put into evidence at the trial; had these documents been exhibited to the grand jury during the time it devoted to this case the entire panel would have had an average of less than twenty seconds to examine each document, with no time whatever allowed to hear testimony or to deliberate. Unquestionably the "short cut" method by which the indictment was obtained here could be employed in any case.

(b) The court below, by limiting its consideration of Rule 6(e) of the Federal Rules of Criminal Procedure to the provision that grand jury proceedings may not be disclosed to defendant nor to his counsel unless "permitted

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by the court * * *" (C. A. Proceedings 9), warped the meaning of that Rule by such undue emphasis on this small portion. Rule 6(e) calls for disclosure of grand jury proceedings "when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." If the showing made here was not sufficient to establish "that grounds may exist for a motion to dismiss," we doubt that a sufficient showing could ever be made in any case. And there can be no claim that the facts alleged were not proved, for the trial court assumed them to be correct (R. 57-58).

In any event, the record discloses that there was no proper exercise of judicial discretion by the district judges in passing on the motion to dismiss. Judge Donovan did not rule on it, but merely passed it over for determination at the trial of the general issue (R. 21), stating in the memorandum attached to his order that "[r]emoval of the veil of secrecy from what transpired in the presence of [the grand jury] in my opinion is not warranted *at this stage of the proceeding*" (R. 22; emphasis supplied). When the motion was renewed at the time the case was called for trial Judge Bell, who was then presiding (R. 44), was taken by surprise (R. 57), and he ruled on the motion in these terms (R. 58):

> * * * I dislike to go into a case if there is some substantial showing that a matter of this kind should have preliminary consideration, and yet this case has been set for trial for six or seven weeks, even [sic] since I returned and have had something to do with it. A jury has been ordered here to start the trial of this case and I am inclined to think that this motion should be overruled and that the trial should be commenced. That will be the order of the Court.

The clear inference from this language is that Judge Bell overruled the motion even though a substantial showing had been made because the case had been set for trial for

a long time, a jury had been ordered and was on hand ready for the trial, and he did not wish to delay the start of the trial with further consideration of this preliminary matter. Such a ruling is not, we submit, entitled to consideration on appeal as an exercise of judicial discretion. Cf. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 483; *Mattox* v. *United States*, 146 U. S. 140, 147; *Felton* v. *Spiro*, 78 Fed. 576, 581 (C. C. A. 6, 1897).

(c) The decision of the court below deprives petitioner of a substantial constitutional safeguard and opens the way for many others to be similarly deprived. The Fifth Amendment provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury", with certain exceptions not here material. The statute under which petitioner was prosecuted (26 U. S. C. § 145(b)) authorizes imprisonment for a violation, hence the offense described in that statute is an "infamous crime" within the meaning of that term as used in the Fifth Amendment. *Mackin* v. *United States*, 117 U. S. 348. Thus an "indictment of a grand jury" was indispensable here to the power of the court to try petitioner for the crime with which he is charged. *Ex parte Bain*, 121 U. S. 1, 12-13. But a grand jury can properly find an indictment only on competent legal evidence such as would be legitimate and proper before a petit jury, and it may not indict on current rumors, unverified reports, evidence of what third persons have said, or other hearsay. *United States* v. *Rubin*, 218 Fed. 245, (D. Conn., 1914); *In re Grand Jury*, 62 Fed. 840, 846 (N. D. Cal., 1894); *United States* v. *Kilpatrick*, 16 Fed. 765, 771 (W. D. N. C., 1883); *United States* v. *Farrington*, 5 Fed. 343 (N. D. N. Y., 1881); *Charge to Grand Jury*, 2 Sawy. 667, 670, 30 Fed. Cas. 992, 993-994 (C. C., D. Cal., 1872; by Field, J.); 1 Chitty Crim. Law 318; see *Hale* v. *Henkel*, 201 U. S. 43, 65-66. As for the *quantum* of evidence necessary to sustain an indictment, it must be such as, unexplained and uncontradicted, would warrant

a conviction by a petit jury. *Charge to Grand Jury, supra; Charge to Grand Jury,* Taney 615, 616-617, 30 Fed. Cas. 998, 999 (C. C., D. Md., 1836; by Taney, J.); 4 Bla. Com. 303; 1 Chitty Crim. Law 318.

We maintain, therefore, that an indictment found on improper evidence is not the "indictment of a grand jury" required by the Fifth Amendment, and that a substantial showing that an indictment was so found raises a constitutional question going to the jurisdiction of the court.[5] This is not to say that any challenge of an indictment, however flimsy the grounds, demands such an inquiry. But if the constitutional guaranty is to mean anything there must be a point where a showing of irregularity in the grand jury's proceedings requires investigation by the court.

The relief which petitioner sought in the trial court in this matter would not have involved a significant impairment of the traditional secrecy of grand jury proceedings. This Court has already recognized that after an indictment is returned and the accused taken into custody, the secrecy of the grand jury proceedings can be relaxed where justice requires it. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234. Important considerations which usually call for secrecy up to that point did not exist here, as the newspapers had already been informed three or four days in advance of what was to transpire (R. 8). Full disclosure has been granted in other cases on facts analogous to those here. *United States* v. *Rubin*, 218 Fed. 245 (D. Conn., 1914); *United States* v. *Kilpatrick*, 16 Fed. 765, 771 (W. D. N. C., 1883); *United States* v. *Farrington*, 5 Fed. 343 (N. D. N. Y., 1881).

"The grand jury is the great inquest between the government and the citizen," as Mr. Justice Story said. *United States* v. *Coolidge*, 2 Gall. 364, 25 Fed. Cas. 622, 623 (C. C.,

[5] We also believe that the "due process of law" guaranteed by the Fifth Amendment, properly construed, applies to grand jury proceedings and requires that indictments be found in accordance with the principles set forth above. We recognize that this Court has expressed itself to the contrary in *Hurtado* v. *California*, 110 U. S. 516, 534, and respectfully submit that that decision should be reconsidered.

D. Mass., 1815). In this case, however, the grand jury was no more than a rubber stamp for the government accusing the citizen, its indictment reflecting the opinion of the government investigator rather than the considered, independent judgment of the grand jurors themselves, reached after a personal consideration of competent evidence that an offense had been committed. We submit that such a paper is not an "indictment of the Grand Jury" within the meaning of the Fifth Amendment, and that therefore the judgment below raises an important constitutional question which this Court should decide.

2. (a) In holding that the agency created by the powers of attorney given by petitioner to O'Gordon and Weinstock authorized the agents to make admissions binding on their principal in a criminal prosecution the court below relied upon the decision of this Court in *American Fur Co.* v. *United States*, 2 Pet. 358 (C. A. Proceedings 11). The justification for its ruling was found by the court below in this Court's assertion in the *American Fur Co.* case (2 Pet. at 364) that "whatever an agent does or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal" (C. A. Proceedings 11).

However, the *American Fur Co.* case involved an agent who had acted for, or in association with, his principal in the commission of the alleged offense and not, as in the instant case, an agent appointed long after the alleged crime was committed. Thus, by taking the above language out of context, the court below has so seriously misconstrued a decision of this Court as to call for review. The true rule of the *American Fur Co.* case is to be found in the last sentence of the same paragraph from which the above quotation was taken (2 Pet. at 365):

> * * * For we hold the law to be, that where two or more persons are associated together for the same

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illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestae*, may be given in evidence against the others; and this we understand, upon a fair interpretation of the opinion before us, to be the principle which was communicated to the jury.

(b) Moreover, the construction given the powers of attorney in this case[6] affects virtually every taxpayer who is involved in a controversy with the Treasury Department. These powers of attorney were given pursuant to the requirement of Paragraph II of the Conference and Practice Requirements of the Bureau of Internal Revenue, which provides that no attorney or agent shall appear or be recognized in any matter unless he files a power of attorney "in proper form authorizing him to prosecute the case, claim, or matter in question * * *." Technical words are not necessary (Paragraph V-A), and no prescribed form is given. Paragraph V-C of the Conference and Practice Requirements provides: "The authority delegated to an attorney or agent in a power of attorney enumerating certain specific acts which may be done will be considered limited to those acts. * * *" That paragraph goes on to provide further that there must be express authority given to permit the attorney (1) to receive checks, (2) to substitute another attorney, (3) to execute a consent to extend the statute of limitations for assessment of a tax, and (4) to execute closing agreements relative to tax liability.

Thus every intendment of these Treasury Department regulations is that the powers of attorney given thereunder shall be strictly construed, that they limit representation to the civil aspects of tax matters, and that without express authorization they shall not be construed as permitting the attorney to bind his principal on any definitive step in the negotiation. The only reported judicial decision on this subject followed the strict construction view, the court there refusing to recognize a waiver by the taxpayer's attorney

[6] These powers of attorney are printed in Appendix B, *infra*, pp. 28-30.

of future claims for depreciation, where the power of attorney extended only to the years under consideration. *Elrod Slug Casting Machine Co.* v. *O'Malley*, 57 F. Supp. 915, 922 (D. Neb., 1944).

This sudden change from a construction giving limited power to bind civilly to a construction giving unlimited power to bind criminally is grossly unfair and exposes thousands of taxpayers to consequences the Treasury Department regulations would never lead them to expect. The decision of the court below alters adversely the position of every taxpayer who has obtained representation to assist in the negotiation of a tax controversy with the Treasury Department, and for this reason also it should be reviewed.

3. In the *Johnson* case this Court sustained the admissibility of expert testimony as to the defendant's net income and unpaid income tax during the disputed period.[7] In the present case the court below, citing the *Johnson* case (C. A. Proceedings 12), approved the admissibility of exhibits prepared by an expert witness showing his analysis of the evidence and his calculations of petitioner's income and expenditures, with the amount of income tax the Government claimed was unpaid. This ruling goes considerably beyond the *Johnson* decision, for with the expert's conclusions reduced to the form of exhibits the jury had a written record of them to take to the jury room. There was no means by which petitioner could make available in the jury room a written record of the cross-examination of the expert showing the extent to which his conclusions on the ultimate issue in the case, *i.e.*, whether petitioner had substantial unreported net income in the prosecution years, were based on his appraisal of conflicting evidence.

Unquestionably a written record carries more weight in the jury room than the uncertain recollection of the jurors. Cf. *United States* v. *Davis*, 103 Fed. 457, 470 (C. C., W. D. Tenn., 1900). Thus the ruling below represents a significant extension of the *Johnson* decision, in that it de-

[7] In the *Johnson* case the conclusions of the expert witness were given orally and were not submitted to the jury in written form. Record, Vol. IV, pp. 13-18, Nos. 4 and 5, October Term 1942.

prives a defendant of the full benefit of his cross-examination of a government expert, the only means by which a defendant can bring to the attention of the jury the extent to which the expert's conclusion rests on decisions which the jury is entitled to make for itself. The effect of the decision below will be felt in virtually every criminal prosecution for tax evasion or for any other offense involving complicated factual situations, giving the government an advantage it has not heretofore enjoyed. Such a far-reaching innovation in criminal prosecutions should be carefully scrutinized by this Court.

We believe that in the course of such review the ruling in the *Johnson* case sustaining the admissibility of expert testimony as to the ultimate issue in a tax evasion prosecution should be reconsidered. The exclusion of such evidence would not work any hardship on the government in the prosecution of even the most complex tax evasion cases. Summarizing the scattered bits of evidence and drawing them together to present one complete picture to the jury can and should be done by government counsel in his summation, using a blackboard, a chart prepared in advance such as was used by the expert in this case, or any other similar visual aid. The difference would be that by this procedure the drawing of conclusions from evidence before the jury would be restricted to the realm of advocacy, where it belongs, and would be kept out of the witness chair, where it has no place except in special types of actions such as eminent domain proceedings.

4. The Fifth Circuit in *Bryan* v. *United States*, 175 F. 2d 223,[8] and the Seventh Circuit in *United States* v. *Fenwick*, 177 F. 2d 488, held that a conviction in a tax evasion case prosecuted on the net worth theory could not be sustained unless the government had established an accurate net worth for the defendant at the beginning of the prosecution year. In each of those cases the conviction was re-

[8] Affirmed by this Court, 338 U. S. 552, on a ground other than that for which it is cited here.

versed because of the failure of the government to prove an accurate starting point. In view of these decisions—indeed, even without them—petitioner was entitled to have the jury instructed as to the elements of a net worth case, including the necessity for the establishment of an accurate starting point. Petitioner's requested instruction No. 11 covering this point was refused by the trial court (R. 582, 623), and no instruction whatever was given in its place. This omission from the instructions to the jury was not discussed in the opinion of the court below, which held generally that the trial "court most carefully protected the rights of the defendant and that as a whole the given instructions were more favorable to the defendant than were the requested instructions" (C. A. Proceedings 17).

True enough, the *Bryan* and *Fenwick* decisions represent a stricter view of the burden of proof which rests on the government in prosecuting an income tax evasion case on the net worth theory than the court below adopted in *Schuermann* v. *United States*, 174 F. 2d 397, certiorari denied, 338 U. S. 831. But if federal appellate courts cannot agree on this important question obviously laymen composing a petit jury would be confused as to the proper standards and would require instruction from the court. Some kind of instruction was particularly necessary here. Whereas in the *Bryan*, *Fenwick* and *Schuermann* cases the courts were dealing with the true starting point, *i.e.*, the beginning of the first prosecution year, the actual starting point here was eight years prior to the beginning of the first prosecution year (C. A. Proceedings 8) and the government admittedly could not establish an accurate net worth for petitioner for the year-ends from that starting point down to the beginning of 1945 (R. 464).

Certainly if this case was so complex as to require an expert to explain the evidence to the jury, then it also required a full and complete explanation of the applicable law, yet the trial court remained silent on this point and even

refused to charge that the government relied for proof of its case on circumstantial evidence (R. 579, 621, 623).

In affirming the judgment despite the fact the trial court had refused to charge on a basic feature of the law of the case, the Court of Appeals so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH B. KEENAN,
ALVIN O. WEST,
JOHN W. GRAFF,
Counsel for Petitioner.

August, 1953.

APPENDIX A

1. Amendment V to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Federal Rules of Criminal Procedure:

Rule 6. The Grand Jury

* * * * * * * *

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

3. Excerpts from regulations of the Bureau of Internal Revenue, Department of the Treasury, 26 CFR § 601.4(d) (1949 Ed.):

(d) *Conferences.* The Bureau has a liberal policy relative to discussion of disputed tax liability. Opportunity for conference is generally accorded either in the office of the collector or one of the other Bureau offices. Application for such a hearing should be made in person, or preferably by letter. The rules governing conferences are set forth in "Conference and Practice Requirements, Bureau of Internal Revenue, Revised February, 1942", published in the Internal Revenue Bulletin, 1942-1, page 384. Such Conference and Practice Requirements read as follows:

Conference and Practice Requirements, Bureau of Internal Revenue; Revised February 1942

* * * * * * * *

Power of Attorney To Be Filed and Evidence of Enrollment To Be Submitted Before Recognition Is Accorded

II. No attorney or agent representing a claimant or other person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim, or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney, or a certified copy thereof, from his principal in proper form authorizing him to prosecute the case, claim, or matter in question. Such power of attorney shall always be filed and evidence of enrollment submitted before such attorney or agent is recognized. In the event, however, that an attorney or agent presents himself for conference who is not familiar with this requirement, or who can show that he has not had reasonable opportunity to obtain a power of attorney from his client, or who has not applied for enrollment, but is able to produce such evidence as will reasonably convince

the Bureau's representative that he has authority to represent the taxpayer, such attorney or agent may be heard with the understanding that a power of attorney in proper form and evidence of enrollment will be promptly forwarded to the Bureau, and that until such power of attorney and evidence of enrollment shall have been filed information will not be disclosed to such attorney or agent relative to the Bureau's attitude in respect of the issues raised or to any other matter relating to the taxpayer's case.

* * * * * * * *

Power of Attorney Requirements

V. Any power of attorney offered in evidence in any case will be accepted only if it is in regular form. Only one power of attorney shall be in effect in any case and there shall be included in such power of attorney the names and addresses of all attorneys or agents to whom the taxpayer has delegated authority to represent him.

A. *Technical language unnecessary.* It is considered necessary in all cases that the power of attorney contain language to convey the principal's intention, although not necessarily in strictly legal form.

* * * * * * * *

C. *Extent of authority delegated.* The authority delegated to an attorney or agent in a power of attorney enumerating certain specific acts which may be done will be considered limited to those acts.

(A) *Express authority required for certain acts.* Express authority to do the following acts must be granted and shown in the power of attorney or such acts will be considered beyond the scope of the agent's authority:

1. To receive but not to indorse and collect checks in settlement of any refund. (See section 3477 of Revised Stat-

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utes, which prohibits assignments of claims or portions thereof, and title "Checks in payment of refunds," paragraph XXI herein.)

2. To delegate authority or to substitute another agent or attorney.

3. To execute consents agreeing to a later determination and assessment of taxes than is provided by statute of limitations.

4. To execute closing agreements relative to the tax liability.

* * * * * * * *

APPENDIX B

Government's Exhibit 34

KNOW ALL MEN BY THESE PRESENTS:

That, I, Thomas W. Banks, of the City of Minneapolis, County of Hennepin, State of Minnesota, do hereby appoint J. A. O'Gordon, of the City of Minneapolis, Hennepin County, State of Minnesota, my attorney for and in my name and stead, to act for me before and with the Internal Revenue Department of the United States, in matters now pending with reference to all taxes assessed against me, and to all matters which may lead to further assessments against me.

Giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever, requisite, necessary or proper to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do, or cause to be done by virtue hereof.

IN WITNESS HEREOF I have hereunto set my hand and seal this 22nd day of November, 1950.

(s.) THOMAS W. BANKS

In the presence of
(s.) BEN R. TOENSING

Subscribed and sworn to before me this 22nd day of November, 1950.

(s.) BEN R. TOENSING
Notary Public in and for
Hennepin County, Minnesota

My Commission expires Nov. 3, 1953.

GOVERNMENT'S EXHIBIT 35

AUTHORITY TO REPRESENT TAXPAYER

To the Commissioner of Internal Revenue
Washington, D. C.

Sir:

Leonard H. Weinstock is authorized to represent me in connection with all tax returns which have been filed with any department of the United States Government. The said representative is authorized to act for me and in my name, place and stead. This letter will serve as written authority authorizing him to examine and secure copies of all returns, claims, correspondence, and papers in connection therewith. This letter will also serve as written authority authorizing him to receive any warrants which may be issued in my name. I hereby specifically authorize the above mentioned representative to secure, if necessary, copies of any income tax returns heretofore filed by me. I hereby specifically authorize Leonard H. Weinstock to enter into and to execute final agreements as provided for under Section 606 of the Revenue Act of 1928. Prior authorizations, if any, are hereby revoked.

The said representative is vested with full power of substitution and revocation. The execution of this instrument hereby ratifies and confirms all the said representative shall lawfully do or cause to be done, by virtue hereof.

Respectfully,

(s.) THOMAS W. BANKS

State of Minnesota
County of Hennepin, ss.

On this 5th day of April, 1951, before me, a Notary Public within and for the said County, personally appeared Thomas W. Banks who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

(s.) FLORENCE S. CUNDIFF
Notary Public

(SEAL.)

FLORENCE S. CUNDIFF
Notary Public,
Hennepin County, Minn.

My Commission expires Dec. 20, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 259

THOMAS W. BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Memorandum opinions of the District Court on petitioner's motion to dismiss the indictment (R. 22), on petitioner's motion for a bill of particulars (R. 40-43), and on petitioner's motion for a new trial (R. 631-634) are not reported. The opinion of the District Court on petitioner's motion to modify sentence is reported at 108 F. Supp. 14 (S.R. 32).[1] The opinion of the Court of Appeals (C.A. Proc. 4) is reported at 204 F. 2d 666.

[1] The record in this Court has not been successively paginated. The following abbreviations will be used to denote the various portions of the record: record filed in the Court of Appeals by the appellant-petitioner, "R."; supplement to the record filed in the Court of Appeals by the appellee-respondent, "S.R."; proceedings in the Court of Appeals, "C.A. Proc."

JURISDICTION

The judgment of the Court of Appeals was entered May 27, 1953 (C.A. Proc. 17), and an order denying petitioner's petition for rehearing was entered June 16, 1953 (C.A. Proc. 33). By order of Mr. Justice Clark, dated July 7, 1953, the time within which to file a petition for writ of certiorari was extended until August 14, 1953. The petition for a writ of certiorari was filed August 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

Petitioner was indicted in three counts for wilfully and knowingly attempting to evade his income taxes for the years 1945, 1946, and 1947. The case was tried on a net worth theory. Petitioner introduced no evidence on his own behalf, and was found guilty on all three counts. The petition for a writ of certiorari, which does not attack the sufficiency of the evidence to support the conviction, presents the following questions:

1. Whether the trial court abused its discretion in denying a motion to dismiss the indictment, where the basis of the motion was the contention that sufficient competent evidence to support the return of the indictment could not have been presented to the grand jury during its deliberations.

2. Whether certain evidence, based upon admissions of the petitioner and his representatives, was properly admitted against him.

3. Whether the trial court abused its discretion in permitting the Government's expert witness to

summarize in written form both the underlying evidence and the calculations which showed the amounts of income taxes the petitioner had failed to pay prior to and during the prosecution years.

4. Whether the charge of the trial court adequately instructed the jury.

STATUTE INVOLVED

Internal Revenue Code:

Section 145. Penalties.

* * * * *

(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was indicted on January 14, 1952, in the United States District Court for the District of

Minnesota, in three counts, charging him with wilfully and knowingly attempting to evade his income taxes for 1945, 1946, and 1947, in the amounts of $23,779.34, $7,385.36, and $10,862.10, respectively (R. 1-3). On February 18, 1952, petitioner filed a motion to dismiss the indictment, to require the taking of testimony from the members of the grand jury, and to require the production of the transcript of the proceedings before the grand jury. (R. 3-5). With this motion petitioner filed an affidavit, sworn to by one of his counsel, alleging, on information and belief, the following: the case against the petitioner was based on the "net worth" theory; petitioner had advised counsel that he had made no statement of any kind, either written or oral, concerning his income tax matters to any representative of the Bureau of Internal Revenue; the grand jury which returned the indictment started to hear testimony at 10:30 a.m.; at 11:45 a.m. it returned the indictment against the petitioner; there was only one witness to testify against the petitioner before the grand jury, the special agent of the Intelligence Unit of the Bureau of Internal Revenue. The affidavit further alleged that it was "a physical and mental impossibility to adequately and properly by competent and legal evidence to present to a grand jury" the necessary information to support the return of the indictment in that length of time. (R. 5-11.)

After the filing of memoranda by petitioner and the United States, District Judge Donovan entered an order deferring the motion for determination at

the trial by the presiding judge (R. 21). With that order Judge Donovan filed a memorandum, stating that he was:

> not persuaded to require production of a reporter's transcript of the proceedings before the Grand Jury. Removal of the veil of secrecy from what transpired in the presence of that body in my opinion is not warranted at this stage of the proceeding. Granting that the indictment must be based on competent evidence, I am not impressed that the time consumed in the presentation of evidence was too little. In the presentation of evidence before the jury, time is a relative matter.

On May 19, 1952, petitioner renewed his motion, which was then denied by the presiding judge (Judge Bell) (R. 58).

The case was tried on a net worth theory, whereby the Government showed, with appropriate qualifications, that the petitioner's net worth, *i.e.*, assets less liabilities, had increased during the taxable years far beyond the income he had reported on his tax returns. The starting point, a well-established fixed figure of petitioner's net worth at a date prior to the prosecution years, was an affidavit sworn to by petitioner in 1937 as to his financial condition. This affidavit showed that his net worth at that time was $18,578.58 (Ex. 33).

The Government's principal witness, insofar as the introduction of evidentiary materials was concerned, was the Bureau of Internal Revenue Agent who had conducted the investigation, George H.

McKusick (R. 188-200, 308-436).[2] The evidence introduced by the Government is summarized in Government Exhibits 224, 225, 226, and 227.[3] Petioner offered no evidence to rebut the Government's case. The Government's evidence showed that the petitioner had, among other holdings, liquor interests, investments in bars (R. 320-323), cafes, in a gambling "news service" (R. 427, 481), and in similar concerns. It further shows that the major source of his reported income was "wagering." (Ex. 9-11; S.R. 5-6). The record also shows obvious attempts by petitioner to avoid the tracing of his financial transactions (see, *e.g.*, R. 184, 192, 198, 217, 244-246, 253, 265, 266-267, 297, 322-328, 369, 412-413, 433-434).

To some degree, evidence was supplied or corroborated by petitioner's admissions, and petitioner objected at the trial to the admission of such testimony. One such admission was that regarding petitioner's living expenses. These amounts were obtained from agreements between petitioner and his representatives, Joseph A. O'Gordon and Leonard H. Weinstock, on the one hand, and the Government agents who had conducted the investi-

---

[2] For the scope and comprehensiveness of this investigation, see R. 191, 327, 330-331, 341, 354, 425-426, 433.

[3] Exhibit 224 is a thorough summary of all the evidence in the case. Exhibit 226 shows the difference between the net income reported by the petitioner and the net income showed by the Government's evidence. It also includes the amount of taxes due, according to each such net income, and the differences between the taxes so calculated. Exhibits 225 and 227 are enlarged photographic reproductions of 224 and 226, respectively, and, by stipulation, were not certified to this Court.

gation, Messrs. McKusick and Kleven, on the other. In February, 1951, Agents McKusick and Kleven prepared an itemized schedule of the petitioner's living expenses as a result of their inquiries into such expenditures (R. 348, 352, 353). This schedule was then exhibited to Mr. O'Gordon, petitioner's attorney (R. 346-348), who also held an express power of attorney to represent him (Ex. 34). Those expenses were calculated as $9,000 for 1945, $15,000 for 1946, and $15,000 for 1947 (R. 349). Mr. O'Gordon showed the schedule to the petitioner and later reported to Mr. McKusick the next day that his client "will be happy to use the figures." (R. 348-350.) After further discussion, Mr. O'Gordon referred the agents to Mr. Weinstock, petitioner's accountant (R. 350). On April 24, 1951, Mr. McKusick showed this schedule to Mr. Weinstock (R. 351), who had filed a power of attorney with the agents (Ex. 35). The schedule was examined by Mr. Weinstock, and it was finally agreed that the proper figures for the prosecution years were $10,000 for 1945, $12,000 for 1946, and $12,000 for 1947 (R. 353). Petitioner objected at the trial to the admissibility of either the schedule agreed to by Mr. O'Gordon or that agreed to by Mr. Weinstock.

A similar question of admissibility arose as to Exhibits 70 and 71. In December, 1950, Mr. O'Gordon was given a series of questions (Ex. 70), concerning certain specific details of several of petitioner's financial transactions, to take to the petitioner, and, as O'Gordon testified, to "return his

answers." He further testified that the questions were "answered by us." (S.R. 1-2). These answers, identified by O'Gordon as Government Exhibit 71, were typed on Mr. O'Gordon's unsigned legal stationery, and were submitted to the agents on February 1, 1951 (see R. 432). In corroboration of the foregoing, Mr. McKusick testified that Exhibit 70 was given to Mr. O'Gordon for answers "by his client, Mr. Banks" (R. 332), and that the answers given him by Mr. O'Gordon for petitioner were contained in Exhibit 70 (R. 333). Petitioner objected to the admissibility of these exhibits and this testimony, chiefly on the grounds that Mr. O'Gordon had no authority to bind him by any admissions which might have been made in the answers to the questions. The objections to the testimony on living expenses and on Exhibits 70 and 71, as well as to the exhibits themselves, were overruled.

Through Bureau of Internal Revenue Agent Kleven, Exhibits 224, 225, 226, and 227 (see *supra*, p. 6, n. 3) were introduced. These exhibits contained a statistical summary of all the relevant evidence which had been adduced by testimony and documents. Agent Kleven's testimony gave in complete detail the source of each of the figures on these Exhibits, and comprehensively explained the application of the net worth theory to the evidence in the case (R. 453-527). The exhibits further showed that petitioner's net worth had increased from $18,578.58 in 1936 to $322,877.34 in 1947, and that petitioner had failed to report and pay taxes

for the prosecution years in the amounts of $15,044.06, $5,829.41, and $12,067.55, respectively. Petitioner's objections to the admissibility of these exhibits and to Agent Kleven's testimony—on the grounds that there was insufficient foundation therefor (R. 458, 463-464) and that it invaded the province of the jury (R. 460)—was overruled.

After the submission of the Government's case, petitioner moved for a judgment of acquittal, which was denied (R. 578). Petitioner then rested, submitting no evidence on his own behalf (R. 578). In closing argument to the jury, petitioner's counsel pointed out that petitioner had furnished the answers in Exhibit 71 "voluntarily to the government" and that petitioner "gave [the information] to them as best he could." (S.R. 18.)

Petitioner submitted fourteen requests for instructions (R. 579-583), and took exception to the refusal of the court to grant six of those requested (R. 624), as well as to certain other portions of the charge. That charge included, *inter alia*, the following paragraphs:

* * * * *

* * * The defendant cannot, therefore, be convicted of the offenses charged in this indictment unless and until each and every essential element of the crime has been established by evidence that satisfies you beyond a reasonable doubt. [R. 612.]

* * * * *

You are instructed to determine whether the individual tax liabilities for the years here in-

volved are correct as the same is set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence. [R. 618.]

* * * * *

Circumstantial evidence consists of facts proved from which the jury may infer by process of reasoning certain ultimate facts. A conviction may be had upon circumstantial evidence, but to warrant a conviction on such evidence the proven facts must not only be consistent with the hypothesis of guilt and point surely in the direction of guilt, and must clearly exclude every other reasonable hypothesis except that of guilt.

To warrant a conviction upon circumstantial evidence, the facts proven must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence. It is not sufficient that the facts coincide and render probable the guilt of the accused, but they must exclude every other reasonable hypothesis and must exclude the hypothesis of innocence. [R. 621.]

The jury returned a verdict of guilty on all three counts (R. 628). The motion for a new trial, raising, *inter alia*, the failure to dismiss the indictment, the reception of oral testimony and exhibits, and the failure to give certain instructions, was denied (R. 629-632). Petitioner was sentenced to a general sentence of three years and was required to pay a fine of $10,000 (R. 634). His motion to reduce

sentence was denied on September 26, 1952 (R. 643). On May 27, 1953, the Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of conviction (C.A. Proc. 4), and on June 16, 1953, denied the petition for rehearing (C.A. Proc. 33).

ARGUMENT

In this Court, petitioner does not challenge the sufficiency of the evidence to support his conviction. He relies solely upon several allegedly improper rulings of the trial court on matters of procedure and evidence. Each of these rulings was correct, and none of these contentions warrants review by this Court.

1. Petitioner contends (Pet. 12-18) that it was error to deny his motion to dismiss the indictment, to produce the transcript of the grand jury proceedings, and to call the grand jurors as witnesses as to what had transpired during their deliberations. The basis of the motion was the contention, supported by the affidavit of counsel, that it was allegedly impossible, within the time actually consumed, for one man to have presented to the grand jury sufficient competent evidence to warrant the return of the indictment. This argument, which is essentially factual in nature, and which both courts below rejected, is without merit.

Bureau of Internal Revenue Agent McKusick was the Government witness before the grand jury. Mr. McKusick had been in charge of the investigation which resulted in the indictment and had conducted the largest part personally. At the trial he was the Government's principal evidentiary wit-

ness. His testimony (R. 188-200, 308-436) occupies a major part of the record of the trial proceedings, and his competency to testify before the grand jury as to petitioner's financial transactions cannot be disputed. See *Murdick* v. *United States*, 15 F. 2d 965 (C.A. 8), certiorari denied, *sub nom. Clarey* v. *United States*, 274 U.S. 752.

Petitioner, however, suggests (Pet. 14) that because other witnesses testified at the trial and because documentary evidence was there introduced, there must have been an impropriety in the grand jury proceedings. But that fact of itself does not render incompetent Mr. McKusick's testimony. For an examination of his testimony at the trial shows his intimate familiarity with practically every one of the petitioner's financial transactions. During the investigation he and the agents operating under his direction had presumably studied all of the basic documents necessary for the final net worth calculation. It is clear that Mr. McKusick could have testified from first-hand knowledge as to substantially all the probative evidence in the case.[4] And, insofar as the length of time spent be-

[4] Even if the standard of the admissibility of evidence before a grand jury is deemed the same as that before a petit jury (but cf. *United States* v. *Thompson*, 251 U.S. 407, 413; *United States* v. *Smyth*, 104 F. Supp. 283, 296-300 (N.D. Cal.); see also, *United States* v. *Johnson*, 319 U.S. 503, 510), Mr. McKusick could have summarized the documents he had examined before the grand jury. For the courts have consistently held that in a trial an expert accountant may summarize on direct examination—where voluminous and complex books and records are involved—the totals and import of the underlying data. *Paschen* v. *United States*, 70 F. 2d 491, 501 (C.A. 7); *Butler* v. *United States*, 53 F. 2d 800, 805 (C.A. 10); *Cooper* v. *United States*, 9 F. 2d 216, 222-223 (C.A. 8).

fore the grand jury is concerned, the court below pointed out (C.A. Proc. 10): "Reviewing [Mr. McKusick's] evidence indicates that not more than an hour or at most an hour and a half would be necessary to place it before a grand jury or a petit jury in case no time was consumed by counsel's objections and arguments to the court on admissibility."

In sum, the motion to dismiss the indictment raised only a question of discretion in the trial court.[5] *United States* v. *Holmes*, 168 F. 2d 888 (C.A. 3). As to this discretion petitioner raises, in essence, only a factual question—whether it was possible within the period of the grand jury's deliberations to have had presented to it sufficient evidence to support the return of the indictment.[6]

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[5] Under Rule 6(e) of the Federal Rules of Criminal Procedure, the unveiling of the secrecy of the grand jury deliberations is incontrovertibly within the discretion of the trial court. Here, the purpose of the unveiling was accomplished by the assumption of both courts below that the allegations of the affidavit were true.

[6] In at least one important respect, however, the affiant appears to have been misinformed. Thus, although he stated on information and belief that the petitioner had "not made any statement of any kind, either written or oral, concerning his income tax matters to any representative of the Bureau of Internal Revenue" (R. 7), the record shows that such statements were made. See *infra*, pp. 14-18.

It would also seem that the allegations of the affidavit in support of the motion were insufficient to warrant the dismissal of the indictment or the production of the grand jurors and transcript of their proceedings. For the affidavit merely alleged that "all the foregoing evidence cannot be presented by one man in less than one hour without the use of *a substantial amount* of incompetent evidence if not all incompete[n]t evidence" (Emphasis supplied) (R. 10). The fact that some of the evidence before the grand jury might have been incompetent would be insufficient to warrant the dismissal of the indictment (*Holt* v. *United States*, 218 U.S. 245, 247-248; *Shushan*

Five judges have carefully considered and rejected his contention that the time was insufficient (R. 22, 58, 629-632; C.A. Proc. 10). There is no need for this Court to undertake another independent analysis of the record.[7]

2. Petitioner contends (Pet. 18-19) that the courts below erroneously bound him by the admissions made by his representatives. But as to each of these admissions, the ruling of the trial court was unexceptionable, and raises no question warranting consideration here.

a. Joseph A. O'Gordon was petitioner's attorney (R. 200-201). He also possessed an express power of attorney, by which he was empowered to act for the petitioner with the Bureau of Internal Revenue in matters relating to his taxes (Ex. 34). In December, 1950, Mr. O'Gordon was given a series of questions (Ex. 70) to take to the petitioner, and to "return his answers." The questions were, as he testified, "answered by us." (S.R. 1-2). The answers, typed on Mr. O'Gordon's legal stationery (Ex. 71), were submitted to the agents on February 1, 1951 (see R. 432). Mr. McKusick, in turn, testified that Exhibit 70 was given to Mr. O'Gordon for answers "by his client, Mr. Banks"

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v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574; *Anderson* v. *United States*, 273 Fed. 20, 29 (C.A. 8)), and the motion to dismiss was therefore properly denied, even on counsel's assumption.

[7] Nor, of course, is there any need, as suggested by petitioner (Pet. 17 n. 5), for this Court to reconsider on this record, *Hurtado* v. *California*, 110 U.S. 516, which was concerned with the scope of the Fourteenth Amendment.

(R. 332), and that the answers given by Mr. O'Gordon for Mr. Banks were contained in Exhibit 70 (R. 333).

This evidence establishes that petitioner supplied the answers to Mr. O'Gordon to return to the agents, and as such, there is no question of their admissibility. Cf. *Gendelman* v. *United States*, 191 F. 2d 993 (C.A. 9), certiorari denied, 342 U.S. 909. Indeed, on summation, petitioner's counsel argued to the jury that petitioner had voluntarily furnished the information to the agents and that he gave the agents the information "as best he could." (S.R. 18).

Further, it is clear that supplying answers to questions concerning petitioner's tax liability was within the scope of the attorney's authority, from his status as attorney, from the express provisions of the power of attorney, and from the testimony in the record. As so authorized, his admissions were, of course, binding upon petitioner in the subsequent criminal proceeding. *American Fur Co.* v. *United States*, 2 Pet. 358; IV Wigmore, *Evidence* (1940 ed.), §1078. The very purpose of the designation of O'Gordon to represent petitioner was to give the Government someone with whom it could deal and upon whom it could rely. To permit petitioner to designate an attorney as his representative and then to pick and choose among those statements made by the attorney on his behalf by which he would be bound would be wholly inconsistent with the responsibilities and reliability of an attorney or other authorized representative.

Cf. Himmelfarb v. *United States*, 175 F. 2d 924, 939 (C.A. 9), certiorari denied, 338 U.S. 860.

b. During the three prosecution years, when petitioner's net worth averaged about $300,000, living expenses were ascribed to him of $10,000, $12,000 and $12,000 respectively, clearly reasonable and non-prejudicial amounts.[8] Petitioner apparently contends, however (Pet. 18-20), that no amounts should have been used for his living expenses for that period. But it is clear that the district court committed no error by admitting the testimony as to petitioner's living expenses.

O'Gordon, petitioner's attorney, took a schedule of living expenses which had been prepared by the investigators to the petitioner, and reported back that petitioner "will be happy to use the figures." (R. 348-350). These figures were $9,000, $15,000 and $15,000, respectively. Subsequently, O'Gordon referred the agents to Leonard H. Weinstock to work out a new schedule (R. 350). According to the testimony of Mr. McKusick, he and Weinstock reached an agreement as to reasonable figures for petitioner's living expenses for the taxable years, of $10,000, $12,000 and $12,000 respectively (R. 353).[9] Weinstock was the accountant who had pre-

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[8] In a net worth computation, amounts of money used as living expenses are added to the increase in net worth—as represented by changes in assets and liabilities—over the taxable year, inasmuch as such amounts must represent income which has been earned, but which has not been consumed by the acquisition of assets.

[9] On the stand at the trial, Weinstock purported to forget the testimony he had given three weeks before at a grand jury hearing to the effect that he had submitted the second schedule

pared the tax returns for petitioner and his wife from 1942 to 1951 (Pet. 7),[10] and petitioner had granted Weinstock a power of attorney to represent him with the Bureau of Internal Revenue agents (Ex. 35). During the course of the investigation petitioner had, in addition, specifically referred the investigators to Weinstock for details concerning his financial transactions (R. 184). Weinstock was also the accountant for many, if not all, of the operating ventures in which petitioner had an interest (R. 264-268).

In these circumstances, petitioner's present contention that neither O'Gordon nor Weinstock had authority to bind him by any admissions as to living expenses is completely without merit. As in the case of Exhibits 70 and 71 (*supra*, pp. 14-16), petitioner had designated these men as his representatives for the very purpose of working out such details.

In any event, there is undisputed evidence in the record that petitioner had himself agreed that the first schedule fairly represented his actual living

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to the petitioner, and that petitioner had specifically agreed to that schedule "without equivocation" (R. 273-274. See also Pet. 8-9). That Weinstock had so testified before the grand jury was brought out when the Government impeached him and confronted him with the transcript of his testimony before that grand jury.

[10] That Mr. Weinstock had an intimate knowledge of petitioner's affairs is further shown by petitioner's argument in the court below (C.A. Br. 99) that he could not have had the requisite intent to violate the provisions of the Code because he relied upon Weinstock to prepare his tax returns properly, and for several years he "signed the tax returns in blank and requested Weinstock to complete them." (See R. 286.)

expenses (or, as Mr. O'Gordon put it, he was "happy to use the figures"). This first schedule was less favorable to him than the one finally used,[11] so that he could not have been prejudiced by the introduction and use of the later agreement. Petitioner's objections to the introduction into evidence of either of the two schedules, which he himself had authorized, were properly overruled.[12]

3. Petitioner contends (Pet. 20-21) that the trial court erred in admitting the testimony of the Government's expert accountant, Agent Kleven, and Exhibits 224, 225, 226 and 227.[13] Acknowledging that this ruling was otherwise proper under the decision of this Court in *United States* v. *Johnson*, 319 U.S. 503, petitioner attempts to distinguish that case on the ground that there the conclusions of the expert witness were not in written form. There is, of course, no merit to the suggestion that oral testimony may, but written testimony may not, be taken to the jury room. At best the question whether such testimony should be kept in oral form is for the discretion of the trial court, subject to normal appellate review. Here, petitioner has ob-

[11] The original schedule to which petitioner and O'Gordon agreed contained figures which, for two of the prosecution years, were $3,000 greater than the figures finally used. For the third year, 1945, the first schedule was $1,000 less than the figure finally used, certainly a *de minimis* difference in the light of the total of $23,520 of unreported income for that year (Ex. 226).

[12] Despite petitioner's implications (Pet. 9, 19-20), the record is clear that there never was any understanding that the object of the investigation of petitioner's financial transactions was the institution or compromise of a subsequent civil suit (R. 276-278, 393-398).

[13] See pp. 8-9, *supra*.

tained one appellate review of the exercise of that discretion. There is no need for still another review by this Court.

Nor is there occasion to review the *Johnson* case (Pet. 13, 20-21), which has been consistently followed and applied, not only by the court below, but also by the other courts of appeals.[14] Such expert accountant testimony in complex tax cases gives the jury "needed help."[15] Petitioner, who offered no evidence in his own behalf, was able at the trial to offer only "trivial" objections to the testimony of the Government's expert (C.A. Proc. 13), and could shake neither the foundation nor the conclusions of the witness. He has shown no reason here why that testimony should have been excluded from the jury's consideration.

4. Petitioner's final contention (Pet. 21-23), that the court's charge did not properly instruct the jury, is without merit. Although the court did not grant petitioner's Requested Instruction No. 11 *in haec verba* (R. 582), it did charge the jury that the Government had the burden of proving beyond a reasonable doubt "each and every essential element of the crime" (R. 612), and that the jury was to determine (R. 618):

> whether the individual tax liabilities for the years here involved are correct as the same is

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[14] See, *e.g.*, *Gendelman* v. *United States*, *supra*; *Graves* v. *United States*, 191 F. 2d 579 (C.A. 10); *United States* v. *Augustine*, 189 F. 2d 587 (C.A. 3); *United States* v. *Skidmore*, 123 F. 2d 604 (C.A. 7), certiorari denied, 315 U.S. 800.

[15] *United States* v. *Augustine*, *supra*, p. 590; VII Wigmore, *Evidence* § 1923.

> set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence.

Those "computations and charts" clearly present the application of the net-worth theory. Further, that theory (which formed the entire basis of the Government's case), and its method of computing income, were made perfectly clear during the trial by Government witnesses and counsel (R. 167, 198, 335-336, 511-515, 585-586), and petitioner does not challenge the validity of the theory as a method of computing taxable income.[16]

Accordingly, the trial court's failure to grant petioner's Requested Instruction No. 11 in its express language could not have prejudiced the petitioner. As the court below, after reviewing the requested instructions and the charge, stated (C.A. Proc. 17):

> * * * the [trial] court most carefully protected the rights of the defendant and * * * as a whole the given instructions were more favorable to the defendant than were the requested instructions. * * *

---

[16] Despite petitioner's implications (Pet. 22), the fact that the initial starting point was established as of a date several years prior to the taxable years is not an unusual circumstance in net worth cases. See, *e.g.*, *United States* v. *Potson*, 171 F. 2d 495 (C.A. 7); *United States* v. *Chapman*, 168 F. 2d 997 (C.A. 7), certiorari denied, 335 U.S. 853; cf. *Schuermann* v. *United States*, 174 F. 2d 397 (C.A. 8), certiorari denied, 338 U.S. 831. Nor was there any error in the fact that no net worth was shown for 1937 to 1940 (see Pet. 22). That the Government did not break that period down into annual segments in no way impairs the validity of the later net-worth calculations.

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The alleged deficiency of those instructions in this case, which, in any event, was non-prejudicial, presents no question of importance for this Court to review.

CONCLUSION

The petition for a writ of certiorari, which does not challenge the sufficiency of the evidence to support the conviction, presents no question calling for review. There is no conflict of decisions. Accordingly, it is respectfully submitted that the petition should be denied.

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SEPTEMBER 1953.

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 13

THOMAS W. BANKS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

AND

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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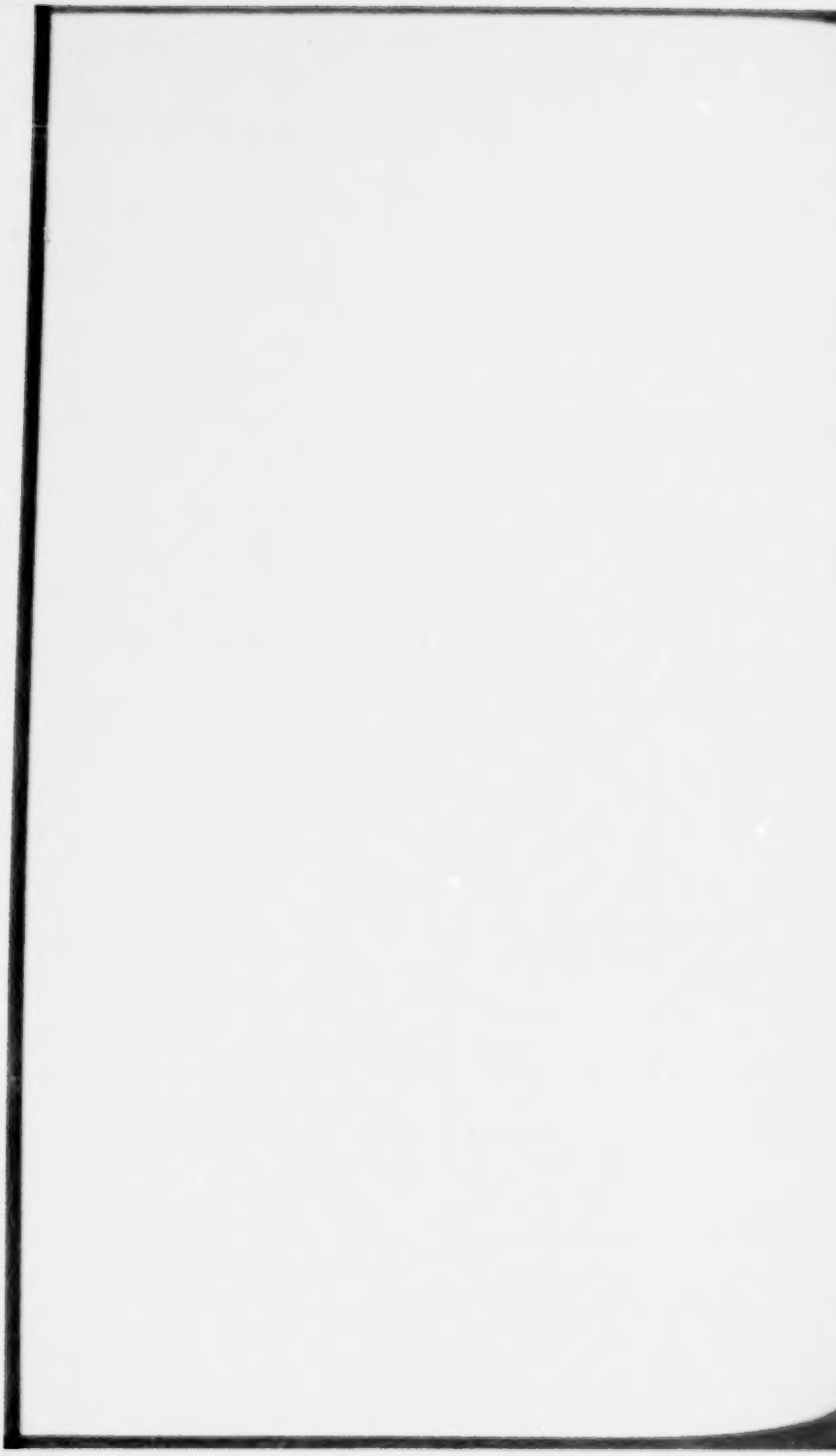

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THOMAS W. BANKS, *Petitioner,*

v.

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MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The petitioner, Thomas W. Banks, by his attorneys, Alvin O. West and John W. Graff, moves the Court for leave to file the attached Supplement to Petition for Writ of Certiorari, and in support of such motion states:

Since the filing of the petition for the writ in this cause, a tax evasion prosecution in which the Government employed the net worth method, petitions in other tax evasion cases where the net worth method was used have been filed with the Court and have been granted; those cases have been argued and only recently the Court has rendered its decisions.* In its opinion in one of those cases, *Holland* v. *United States,* this Court said (slip opinion, p. 2):

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* *Holland* v. *United States,* No. 37; *Friedberg* v. *United States,* No. 18; *United States* v. *Calderon,* No. 25; *Smith* v. *United States,* No. 52.

> • • • At our last Term a number of cases arising from the Courts of Appeals brought to our attention the serious doubts of those courts regarding the implications of the net worth method. Accordingly, we granted certiorari in these four cases and have held others to await their decision.

From all the circumstances it is apparent that the present case is one of the cases which the Court has been holding awaiting the decision in the four cases referred to above. Thus petitioner is in the unusual situation of having the decision in his case made on the basis of principles enunciated in other cases which arose in this Court and were decided long after his petition was filed.

Since the decisions in the four cases above-mentioned are to have such a significant bearing on the decision in the instant case, petitioner respectfully suggests to the Court that in the interest of the proper and complete presentation of his case, and as an aid to the Court in the analysis of this case to determine the impact on it of these decisions rendered since the petition herein was filed, petitioner should be granted leave to file the attached supplement to his petition for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 13

THOMAS W. BANKS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

ORDERS PERTAINING TO PETITION

Under date of October 19, 1953, an order was entered in this cause denying the petition for writ of certiorari. 346 U.S. 857. Under date of June 7, 1954 the order denying certiorari was vacated and the case was restored to the docket. 347 U.S. 1007.

At the same time this case was restored to the docket this Court granted certiorari in four cases which, like the instant case, are tax evasion cases which were prosecuted on the net worth theory.*

Since those four cases have now been decided the purpose of this supplement is to point out the respects in which

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* *Holland* v. *United States*, No. 37; *Friedberg* v. *United States*, No. 18; *United States* v. *Calderon*, No. 25; *Smith* v. *United States*, No. 52.

the decisions rendered in those cases bear on the issues raised in the present case.

I. Essential Facts in the Government's Case Against Petitioner Were Established Solely by Uncorroborated Admissions Made Subsequent to the Alleged Crime

A substantial part of the Government's evidence consisted of answers submitted to a Government investigator by petitioner's attorney in response to certain questions and testimony as to agreements with petitioner's agents as to petitioner's living expenses (Pet. 7-8). The living expenses for the three prosecution years totaled $39,000 according to one agreement and $34,000 according to the other, as compared with a total of alleged unreported income for the same years of only $54,062.76 (R. 349, 353; Ex. 224). Petitioner objected to this evidence on the ground that these admissions were not binding on him (R. 205, 347-348, 352).

The second question in the petition (Pet. 3, 18-20) challenges the ruling of the court below to the effect that a power of attorney for representation before the Treasury Department authorizes the agent to make admissions which are binding on the taxpayer in a criminal prosecution. But if it should be decided that these admissions were properly received in evidence, this Court should give consideration to the fact that these admissions alone were taken as establishing the facts they purport to set forth, as they are not corroborated (R. 354, 449, 450, 451, 475, 476, 477, 478, 479, 497, 505, 517, 518, 544).

Since these admissions were made long after the alleged offense they clearly required corroboration, under the decisions of this Court in *Smith* v. *United States*, No. 52, October Term 1954, and *Opper* v. *United States*, No. 49, October Term 1954. We submit that this Court, in passing on the petition herein, should apply the rule announced in those cases requiring corroboration of admissions made after the fact.

II. The Admission on Which the Government Based Its Starting Point, Although Made Prior to the Alleged Crime, Was Made Under Such Circumstances as Should Bring It Within the Rule of the Smith and Calderon Cases, Requiring Corroboration, Rather Than the Warszower Case Under Which Corroboration Is Not Required

Although the prosecution years were 1945, 1946, and 1947, the Government took as a starting point an affidavit sworn to by petitioner in 1937 (Br. in Opp. 5). This affidavit (Ex. 33) was submitted by petitioner to the Alcohol Tax Unit in support of an offer in compromise of an assessment of federal alcohol taxes against petitioner and others (R. 192, 337-339, 340).

With respect to the question of the necessity for corroboration, this affidavit presents a situation distinguishable from that dealt with by this Court in *Warszower* v. *United States*, 312 U.S. 342. In the *Warszower* case the admissions on which the Government relied all involved answers by the defendant to routine inquiries as to his country of birth and citizenship status, made on occasions prior to the alleged offense when defendant entered this country, when he registered for the draft, and when he applied for a reentry permit. In none of these situations was the defendant in an adversary position to the Government, so that there was no reason to assume that there was any motive, such as self-interest, which would lead him to give information which was untrue.

On the other hand, the record here discloses that petitioner and others had been subjected to an alcohol tax assessment of $33,589.92, so that his interests were unquestionably antagonistic to the Government (R. 339, 340). With respect to the affidavit submitted by petitioner in support of the offer to compromise this assessment, the situation is like that described by this Court in the *Holland* opinion—"when a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth."

Because the admission here was made at a time when the interests of the Government and the petitioner were antagonistic, we contend that it falls within the rationale of the *Smith* and *Calderon* cases, and that unless it is corroborated it should not be allowed to sustain a conviction in another situation where the interests of the Government and the petitioner are likewise antagonistic.

This matter is of particular importance not only because the Government made no effort to corroborate the statements contained in the affidavit—here the Government agent in fact deliberately ignored evidence which he had (for example, subsequent income tax returns) clearly indicating that the information in the affidavit concerning petitioner's financial position was incomplete (R. 540-542, 546-547). We submit that to require corroboration of such an admission is consistent with the reasoning of this Court in the *Smith* and *Calderon* decisions and is not in conflict with a proper application of the *Warszower* decision.

III. What This Court Has Described as the Dangerous Practice of Receiving in Evidence, Without Guarding Instructions, Charts Summarizing the Analysis and Computation of the Government's Expert Witness Was Followed in This Case

In the *Holland* case this Court undertook "to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases," and in the course of its remarks said (slip opinion, p. 5):

> * * * There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.

We submit that the third question in the petition (Pet. 3, 20-21) deals with precisely the same situation referred to by this Court in the language quoted above.

IV. The Instructions in This Case Failed to Meet the Standard Prescribed by This Court in the Holland Opinion, as They Did Not Include a Summary of the Nature of the Net Worth Method, the Assumptions on Which It Rests, and the Inferences Available Both For and Against the Accused, and a Requested Instruction of This Type Was Refused

This Court, in concluding its statement in the *Holland* case of the dangers which trial courts should guard against in tax evasion prosecutions on the net worth theory, said (slip opinion, pp. 6-7):

> * * * Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. * * *

In this case petitioner submitted a requested instruction to the trial court covering several essential features of the proof of a net worth case, and the denial of that instruction, affirmed by the Court of Appeals, is urged in the petition as being a question of sufficient importance to warrant its review by this Court (Pet. 3-4, 10-11, 21-22). Attempting to justify the refusal of the instruction requested by petitioner, the Government relies on an instruction directing the jury to determine (Br. in Opp. 19-20; R. 618):

> whether the individual tax liabilities for the years here involved are correct as the same is set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence.

In addition to the fact that this instruction does not comprehend any of the features of petitioner's requested

instruction which was refused, the instruction above-quoted has the added vice of emphasizing the charts which were being placed in their hands to take to the jury room, setting forth the computations of the Government's expert, and making their decision in the case turn on their finding as to the accuracy of his calculations. We submit that, instead of showing a compliance with the caution given by this Court as to the substance of the charge, the instruction as given further demonstrates the importance of the third question in the petition (Pet. 3, 20-21).

CONCLUSION

For the foregoing additional reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1954

Office-Supreme Court, U. S.
FILED
OCT 15 1953
HAROLD B. WILLEY, Clerk

TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

October Term, 1953

No. [redacted] 15

AUSTIN F. McFEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-18-53

No. 13482

United States
Court of Appeals
for the Ninth Circuit

AUSTIN F. McFEE, Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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In the United States District Court for the District of Idaho, Northern Division

No. 4412

UNITED STATES OF AMERICA,

vs.

AUSTIN F. McFEE, Defendant.

INDICTMENT

Vio. Sec. 145 (b) Internal Revenue Code; 26 USC Sec. 145 (b)

The Grand Jury charges:

Count One

That on or about the 11th day of March, 1946, in the District of Idaho, Austin F. McFee, late of Wallace, Idaho, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Idaho, at Boise, Idaho, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $25,166.67 and that the amount of tax due and owing thereon was the sum of $10,021.05, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $105,077.90, upon which said net income he owed to the United States of America an income tax of $71,076.35.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

Count Two

That on or about the 15th day of March, 1947, in the District of Idaho, Austin F. McFee, late of Wallace, Idaho, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Idaho, at Boise, Idaho, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $39,679.01 and that the amount of tax due and owing thereon was the sum of $18,091.35, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $113,748.77, upon which said net income he owed to the United States of America an income tax of $74,881.45.

In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

A True Bill.

/s/ MYRON SWENDSEN,
Foreman

/s/ PAUL S. BOYD,
Assistant U. S. Attorney

Presented by the Foreman in open court and filed in the presence of the Grand Jury Nov. 8, 1951.

[Endorsed]: Filed Nov. 8, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR BILL OF PARTICULARS

To: John Carver, Esquire, United States District Attorney:

You will please take notice, and are hereby notified that upon the annexed affidavit, J. F. Emigh, Esquire, of counsel for the defendant in the above entitled action, duly sworn to on the 29th day of March, 1952, the indictment herein, a copy of which is annexed hereto, and upon all the proceedings heretofore had herein, the undersigned will move this Court, at the Court Room in said Court on the 1st day of April, 1952, at the United States Court House in the City of Coeur d'Alene, State of Idaho, at 10:30 o'clock a.m., or as soon thereafter as counsel can be heard, for an order directing the Honorable United States District Attorney for the District of Idaho, to furnish to the undersigned a Bill of Particulars of the indictment herein, as follows:

1. Informing and advising defendant and his counsel, of all of the sources of, and each source of, all items of taxable income which it is charged in Count One of the indictment on file herein, defendant Austin F. McFee did receive in the taxable year 1945, and which was by him not reported, and not included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, in excess of $25,166.67, constitu-

ting and comprising the sum of $105,077.90 (including said sum of $25,166.67) as alleged and charged in Count One of the indictment herein, to be net income.

2. Fully informing and advising defendant and his counsel of the items and amounts of each item of taxable income which it is charged in Count One of the indictment on file herein, the defendant A. F. McFee did receive in the taxable year 1945 and by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $105,077.90 (including the said sum of $25,166.67, reported by defendant) as charged and alleged in Count One of the indictment herein, to be net income.

3. The name or names of all persons, firms and corporations from whom it is charged in Count One of the indictment on file herein, the defendant Austin F. McFee did receive in the taxable year 1945, income by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $105,077.90 (including said sum of $25,166.67, reported by defendant) charged and alleged in Count One of the indictment herein to have been received and not reported by defendant.

4. Informing and advising defendant and his counsel, of all of the sources of, and each source of, all items of taxable income which it is charged in

Count Two of the indictment on file herein, defendant Austin F. McFee did receive in the taxable year 1946, and which was by him not reported, and not included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, in excess of $39,679.01, constituting and comprising the sum of $113,748.77 (including said sum of $39,679.01) as alleged and charged in Count Two of the indictment herein, to be net income.

5. Fully informing and advising defendant and his counsel of the items and amounts of each item of taxable income which it is charged in Count Two of the indictment on file herein, the defendant A. F. McFee did receive in the taxable year 1946 and by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $113,748.77 (including the said sum of $39,679.01, reported by defendant) as charged and alleged in Count Two of the indictment herein, to be net income.

6. The name or names of all persons, firms and corporations from whom it is charged in Count Two of the indictment on file herein, the defendant Austin F. McFee did receive in the taxable year 1946, income by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $113,748.77 (including said sum of $39,679.01 reported by de-

fendant) as charged and alleged in Count Two of the indictment herein to have been received and not reported by defendant.

7. And for such other relief as to the Court may seem just and proper.

Dated April 1, 1952.

/s/ J. F. EMIGH,
/s/ JAMES P. KEANE,
Attorneys for Defendant

[Printer's Note: The attached Indictment is a duplicate of Indictment set out in full at pages 3 and 4 of this printed record.]

EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR BILL OF PARTICULARS

State of Montana,
County of Silver Bow—ss.

J. F. Emigh, being first duly sworn, deposes and says: that he is an attorney of law, duly admitted and licensed to practice law in all of the courts of the State of Montana, in the Federal Court of the District of Montana, in the Federal Court of the District of Idaho, and in the United States Court of Appeals; that he has been engaged as one of the attorneys to represent the defendant Austin F. McFee, above named; and that over a period of several

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months, he has been working with the accountants for the defendant in regard to alleged failure of defendant to report gross earnings of income during the year 1945 and 1946; that as Affiant is informed by the accountants for said defendant, Austin F. McFee, neither the books of account of said defendant nor the bank records of said defendant, or other records of said defendant known by the said accountants to exist or known by Affiant to exist, reflect or disclose gross income for the years 1945 and 1946 in excess of the amount of defendant Austin F. McFee, duly reported in his income tax returns for said respective years; that as Affiant is informed and believes, and states on information and belief, the information for and computation of the income alleged by the Government to have been received for the calendar year ending December 31, 1945, in the sum of $105,077.90, is made up of $25,166.67, appearing on the books and records of said Austin F. McFee, and by him reported, and the remainder upon some alleged information obtained by the officers and agents of the Government wholly unknown to Affiant; that as affiant is informed and believes and believes and states on information and belief, the information for and computation of the income alleged by the Government to have been received for the calendar year ending December 31, 1946, in the sum of $113,748.70, is made up of $39,679.01, appearing on the books and records of said Austin F. McFee and by him reported, and the remainder upon some alleged information obtained by the officers and agents of the Government,

unknown to affiant and not shown on the books and records of defendant; that inasmuch as the indictment on file herein, both as to Count One and as to Count Two does not advise the defendant and his counsel of the source or sources, or nature of income claimed by the Government to not have been reported by the defendant, nor the person or persons from whom said income is alleged to have been received, said defendant can not, nor can defendant's attorneys adequately prepare a defense to Counts One and Two of the Indictment, and said defendant and his attorneys can not be prepared to meet the Government's testimony and evidence by reason of ignorance of the Government's claims as to income not reported, and will, unless being informed thereon in the particulars requested in defendant's motion for a Bill of Particulars, herewith filed, be taken by surprise at the time of the trial, will not be able to make adequate defense to the indictment, and will thereby be greatly and materially prejudiced in the matter of having a fair trial in said action.

Wherefore Affiant Prays:

That the motion of defendant herein be granted to the end that in the discharge of their duties as officers of this Court and attorneys of the Bar of this Court, counsel will be able to safe-guard and protect the rights of the defendant and properly discharge their duties in the premises.

/s/ J. F. EMIGH

Subscribed and sworn to before me this 28th day of March, 1952.

[Seal] /s/ JOHN T. MULLANY,
Notary Public for the State of Montana, residing at Butte, Montana. My Commission expires August 15, 1952.

Acknowledgment of Service attached.

[Endorsed]: Filed April 1, 1952.

[Title of District Court and Cause.]

NOTICE OF AMENDED AND SUPPLEMENTAL MOTION FOR BILL OF PARTICULARS

To: John Carver, Esquire, United States District Attorney:

You will please take notice, and are hereby notified that upon the affidavit, J. F. Emigh, Esquire, of counsel for the defendant in the above entitled action, duly sworn to on the 29th day of March, 1952, filed herein, a copy of which is annexed hereto, the indictment herein, a copy of which is annexed hereto, and upon all proceedings heretofore had herein, the undersigned will move this Court, at the Court Room in said Court on the 2nd day of April, 1952, at the United States Court House in the City of Coeur d'Alene, State of Idaho, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, for an order directing the Honorable United States

District Attorney for the District of Idaho, to furnish to the undersigned a Bill of Particulars of the indictment herein as follows:

1. Advising and informing defendant and his counsel of the theory of the prosecution of this case, as to whether or not, the case will be prosecuted and tried on the theory that the defendant during the years 1945 and 1946, as embraced within counts one and two of indictment, received items of income and amounts of income during said years, which will be specifically presented by evidence of the amounts paid, the sources of the amount received and the persons, firms or corporations paying the same; or whether said counts will be sought to be proved upon a net worth theory, that is to say, whether the Government will attempt to establish by evidence over a series of years that the defendant had a certain net worth, that is to say, certain sums available for expenditures and that said defendant did for the respective years, charged in counts one and two of the indictment, expend monies greater than his net worth, at the beginning of the respective years, plus reported income, less net worth at the end of each year, making up the said gross sums for each of said years in said respective counts by the Government alleged to have been received by the defendant and not reported in his income tax return for each of said years.

2. That if the Government intends to rely for proof of the counts charged upon specific items of income alleged to have been received during the

years 1945 and 1946 respectively, then, that the plaintiff be required to provide in said bill of particulars the following information:

A. Informing and advising defendant and his counsel, of all the sources of, and, each source of, all items of taxable income which it is charged in Count One of the indictment on file herein, defendant Austin F. McFee did receive in the taxable year 1945, and which was by him not reported, and not included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, in excess of $25,166.67, constituting and comprising the sum of $105,077.90 (including said sum of $23,166.67) as alleged and charged in Count One of the indictment herein, to be net income.

B. Fully informing and advising defendant and his counsel of the items and amounts of each item of taxable income which it is charged in Count One of the indictment on file herein, the defendant A. F. McFee did receive in the taxable year 1945 and by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $105,077.90 (including the said sum of $25,166.67, reported by defendant) as charged and alleged in Count One of the indictment herein, to be net income.

C. The name or names of all persons, firms and corporations from whom it is charged in Count One of the indictment on file herein, the defendant Aus-

tin F. McFee did receive in the taxable year 1945, income by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $105,077.90 (including said sum of $25,166.67, reported by defendant) charged and alleged in Count One of the indictment herein to have been received and not reported by defendant.

D. Informing and advising defendant and his counsel of all of the sources of, and each source of, all items of taxable income which it is charged in Count Two of the indictment on file herein, defendant Austin F. McFee did receive in the taxable year 1946, and which was by him not reported, and not included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, in excess of $39,679.01, constituting and comprising the sum of $113,748.77 (including said sum of $39,679.01) as alleged and charged in Count Two of the indictment herein, to be net income.

E. Fully informing and advising defendant and his counsel of the items and amounts of each item of taxable income which it is charged in Count Two of the indictment on file herein, the defendant A. F. McFee did receive in the taxable year 1946 and by him not reported and included in his income tax return filed with the Collector of Internal Revenue for the Collection District of Idaho, constituting and comprising the sum of $113,748.77 (including

the said sum of $39,679.01, reported by defendant) as charged and alleged in Count Two of the indictment herein, to be net income.

3. That if the Government intends to establish the facts charged in the indictment by circumstantial evidence, that is, by estimate of net worth of defendant at the commencement of the years embraced within each respective count of the indictment and during the period of each respective count alleged, and proposes to show by evidence of expenditures during said years in excess of the claimed net worth of defendant at the beginning of each respective term, plus reported income, less net worth of defendant at the end of each period, the amount of unreported income, then, if such theory is employed, that defendant be furnished a bill of particulars informing him as to the following:

A. The year or years in respect to which evidence will be introduced by the Government, as to the net worth income and deductions of defendant forming the basis of the claims of the Government as to net worth of the defendant at the beginning of each year as to which the indictment charges unreported income, and

B. That as to each of said years, defendant be informed of the claimed net worth of the defendant for each year of the period over which and during which, testimony and evidence will be offered to prove the element of net worth of defendant at the commencement of the calendar year 1945, and commencement of calendar year 1946.

C. And that the defendant be informed of the amount of the alleged gross income and deductions from gross income and deductions from gross income allowed by the Government agency during each of said years over which the computation to be employed by the Government, will be based.

4. That if the Government intends to rely upon some other or different theory to prove its case, defendants be furnished particulars of such theory and the nature of proof and method of proof to be employed.

5. And for such other relief as to the Court may seem just and proper.

Dated April 1, 1952.

/s/ J. F. EMIGH,
/s/ JAMES P. KEANE,
Attorneys for Defendant

[Printer's Note: The attached Affidavit in Support of Motion for Bill of Particulars is a duplicate of Affidavit set out in full at pages 8 to 10; Indictment is a duplicate of Indictment set out in full at pages 3 and 4 of this printed record.]

[Endorsed]: Filed April 2, 1952.

In the United States District Court for the District of Idaho, Northern Division

[Title of Cause.]

MINUTE ORDER

Comes now the District Attorney with the defendant and his counsel into court, whereupon, the Court ordered the plaintiff to furnish the defendant with a bill of particulars sufficient so that he will not be taken by surprise.

Dated: April 2, 1952.

[Title of District Court and Cause.]

BILL OF PARTICULARS

Pursuant to the opinion of the Court on defendant's motion for a bill of particulars, the United States of America herewith submits said bill:

I.

The source of the defendant's income for the years 1945 and 1946, to the government's knowledge, is limited to those sources reported by the defendant for income tax purposes for said years.

II.

During the years of 1945 and 1946 the defendant's private expenditures in excess of his known and declared resources were as follows:

Nature of Expenditures	Year 1945	Year 1946
Purchases of Bank Exchange		$17,800.00
Purchase of stocks		10,000.00
Funds invested in businesses	$28,800.00	29,250.00
Payment of fines		10,000.00
Payment of attorney fees		3,000.00
Loans made	44,613.06	8,400.00
Loans repaid	7,789.13	12,637.68
Total	$81,202.19	$91,087.68
Less: Known Private Resources		
Miscellaneous receipts not deposited in bank accounts	123.76	544.02
Repayment of loans		1,000.00
Proceeds of Company check cashed		15,000.00
Total	123.76	16,544.02
Total Unexplained Private Expenditures	$81,078.43	$74,543.66
Less: Credit given for allowable deductions in connection with equipment alleged stolen—not claimed on income tax return	1,167.20	473.90
Amount alleged by Government in the indictment not reported by the defendant in his income tax return	$79,911.23	$74,069.76
	Count I	Count II
Viz: Amount alleged in indictment as taxpayer's net income for the year	105,077.90	113,748.77
Net income reported in tax return	25,166.67	39,679.01
Amount alleged as not reported by taxpayer defendant	$79,911.23	$74,069.76

III.

The government proposes to prove that defendant's unexplained private expenditures, as set out herein above in Paragraph II, were not made by defendant from his declared available resources as

reflected by defendant's business books and private bank accounts. That is to say, the government proposes to prove that defendant could not have made such expenditures from current reported earnings or from funds which he had accumulated on the books and bank accounts of his various business enterprises and/or his private bank accounts.

From 1936 to and including 1944 all of defendant's business was conducted through various business enterprises known to the government, principally the North Idaho Sales Company, and those operations reflected on the books of those enterprises. Defendant's books reflect his original investment in his business enterprises and his earnings through those businesses during that period of years, namely, 1936 through 1944, which coincides with the income reported for income tax purposes, except for certain adjustments made by Internal Revenue Agents who examined the income tax returns for years prior to 1941, with respect to which adjustments the defendant, or his authorized representative, was furnished a written report.

Dated this 2nd day of April, 1952.

/s/ JOHN A. CARVER,
United States Attorney for the District of Idaho

/s/ DUDLEY L. WILSON,
Special Asst. U. S. Attorney for the District of Idaho

Acknowledgment of Service attached.
[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

MOTION FOR CONTINUANCE

The defendant moves for an order continuing said cause over the term on the following grounds:

1. The affidavit of J. F. Emigh.
2. The affidavit of Harold S. Purdy.
3. The records and files in said cause.
4. That said defendant can not safely go to trial at this term for the reasons stated in said affidavits.

/s/ J. F. EMIGH,
Attorney for Defendant
/s/ HAROLD S. PURDY

Acknowledgment of Service attached.

[Endorsed] Filed April 4, 1952.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

State of Idaho,
County of Kootenai—ss.

Harold S. Purdy, being first duly sworn upon his oath deposes and says:

That he is a duly licensed and practicing attorney, of the State of Idaho, and entitled to practice in the above entitled Court.

That on April 1, 1952, and after the arraignment of the defendant, Austin F. McFee, in the above entitled matter, the said defendant Austin F. McFee, and his attorney J. F. Emigh, called at my

office, for the purpose of associating me, in the representation, of the defendant Austin F. McFee, in the defense of the above entitled action, and at that time, handed me a copy of the indictment and informed me that said case had been definitely set for trial on the 22nd day of April, 1952.

I was of the opinion that under the indictment, the Government could have proceeded on at least two recognized theories of law, or any other theory, that might have been known to them, and a motion was then prepared for presentation to the Court, requiring the Government to furnish a bill of particulars, and on the 2nd day of April, 1952, the Court required the Government, to furnish a bill of particulars, setting forth the theory upon which they would proceed.

That thereafter, on the 3rd day of April, 1952, the Government furnished the defendant, with a bill of particulars, which indicates that the Government's evidence will consist of books, reports and records of the defendant over a period of years, dating back as far as 1936 and including the year 1944, and using those figures as a basis for unreported and unexplained expenditures in the year 1945 and 1946.

Affiant is of the opinion, that it will be necessary, to trace funds belonging to defendant, for as far back as the year 1936 and likely for many years prior thereto, in order to account for any unexplained expenditures, referred to in the bill of particulars furnished defendant.

That if this can be successfully accomplished, and

established, it would constitute a complete and absolute defense to said indictment.

That during the period of defendant's business operations, for many years he has conducted business in the States of Washington, Idaho, Montana and probably other states; that his books and records are not centrally located. That it will be necessary to locate, contact and interview various witnesses, to explain, and establish availabity of funds, during the years covered by the indictment and bill of particulars and to cover unexplained expenditures, during the years 1945 and 1946, if any such funds were available, as defendant maintains they were, and to check such information against defendant's books, records and reports to determine if the items relied upon are or are not included therein. The witnesses who may be able to establish the facts necessary to defendant's defense are scattered over a number of states and some may, and doubtless will, be difficult to locate. That the period of time over which investigation in behalf of defendant must be made is in excess of sixteen (16) years. That affiant is informed and believes that the Government has been for a period in excess of six (6) years, using numerous agents in procuring the evidence which will be relied upon to establish the Government's case.

That affiant has not had an opportunity to generally discuss with the said defendant, defendant's various business transactions.

That with only eighteen (18) days prior to trial, it appears that J. F. Emigh and affiant, exerting an

honest effort, to prepare such matter, can not fully and completely prepare the defense to said action within the time remaining, and to conduct the necessary legal research, in order that defendant's defense will be fairly submitted.

That affiant is of the opinion that a continuance as requested for the purposes herein set forth, will not in any manner prejudice the Government's case, and that if said continuance is denied, that said defendant's defense will be seriously prejudiced and handicapped.

/s/ HAROLD S. PURDY

Subscribed and sworn to before me this 4th day of April, 1952.

[Seal] /s/ ELEANOR M. PAVLAK,
Notary Public for State of Idaho. Residing at Coeur d'Alene, Idaho.

[Endorsed]: Filed April 4, 1952.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

State of Idaho,
County of Kootenai—ss.

J. F. Emigh, being first duly sworn upon his oath deposes and says:

That he is one of the attorneys for the defendant in the above entitled action. That affiant has read the affidavit of Harold S. Purdy, filed herewith, knows the contents thereof and states that to the

best of his knowledge, information and belief, said affidavit is true.

That affiant for some months prior to the indictment in this proceeding had been attorney representing Austin F. McFee, the defendant in the tax matter out of which the present case arose. That however, in connection with affiant's work, he consulted with Messrs. Newland and Blinn, certified public accountants, being the accountants representing defendant, Austin F. McFee, for the most part. That affiant never, prior to his employment in this case, had an opportunity, nor did he, question Mr. McFee at any length or detail respecting matters which would constitute a defense in the present case nor has affiant at any time prior to said employment, been familiar with the details of the case, relying entirely on advice from time to time as certain matters arose as to what the accountants had discovered in the books of account of the defendant and in the defendant's records. That on or about the 11th or 12th day of March, 1952, he received a notice dated February 29, 1952 from Mr. Boyd, assistant United States District Attorney, that arraignment in the said cause was set for April 1, 1952. That affiant immediately contacted Mr. McFee, who came to Butte on or about March 13th, 1952, to make arrangements to employ affiant as one of his attorneys. That affiant resides in Butte, Montana and understood under the rules of this Court that it was necessary to be associated with some Idaho attorney. That affiant did not have an opportunity to consult Mr. McFee as to his defenses to the action nor

could affiant do so for the reason that the indictment did not disclose the Government's theory of the case and did not contain a statement of the particular circumstances of the offenses charged, to enable affiant to prepare a defense. That upon motion for a bill of particulars and amended and supplemental motion for bill of particulars presented April 1st and 2nd respectively, a bill of particulars was furnished from which it appears that the Government relies, to establish the unreported income charged in the indictment for the years 1945 and 1946, upon the income tax reports and books of record of the defendant over a period of some sixteen (16) years. That affiant has no familiarity with these income tax reports or with these records. That defendant has stated to affiant that if given time, he is convinced that he can establish that the income alleged to have been received by him and unreported for the years 1945 and 1946, consisting, as the Government maintains in the bill of particulars, of unexplained expenditures, can be shown to have been funds available for expenditure in said years by defendant but not consisting of earnings or income for said year. Affiant has had no opportunity to prepare an adequate defense in this case. That it will require many weeks to do so for the reason stated in the affidavit of Harold S. Purdy, filed herewith.

That arrangements for the participation of Mr. Purdy in this case were not completed until after the arraignment of defendant on the 1st day of April, 1952. That affiant believes defendant can not

proceed to trial during the current term of Court, without great prejudice.

That defendant cannot adequately prepare his defense during the current term of Court, or for some weeks thereafter.

Further affiant sayeth not.

/s/ J. F. EMIGH

Subscribed and sworn to before me this 3rd day of April, 1952.

/s/ M. LUCILLE DOLAN,
Notary Public for State of Idaho, residing at Coeur d'Alene, Idaho. My commission expires April 24, 1952.

[Endorsed]: Filed April 4, 1952.

In the United States District Court for the District of Idaho, Northern Division

[Title of Cause.]

MINUTE ORDER

This cause came on for hearing on defendant's motion for a continuance, John A. Carver appearing for the United States, and Harold S. Purdy for the defendant. Upon inquiry of the Court, counsel for the defendant stated he wished to submit the motion without argument, whereupon the Court announced that the motion was overruled.

Dated: April 4, 1952.

[Title of District Court and Cause.]

AMENDED BILL OF PARTICULARS

Now Comes the plaintiff and moves that Paragraph II of the Bill of Particulars filed with this Honorable Court on April 3, 1952, be amended and revised so that it now reads as follows:

II.

During the years of 1945 and 1946 the defendant's private expenditures in excess of his known and declared resources were as follows:

Nature of Expenditures	1945	1946
Purchases of Bank Exchange		$14,000.00
Purchases of stocks		10,000.00
Funds invested in business	$28,800.00	29,250.00
Payment of fines		16,500.00
Payment of attorney fees		3,000.00
Loans made	44,613.06	8,400.00
Loans repaid	7,789.13	5,637.68
	$81,202.19	$86,787.68
Less: Known Private Resources		
Miscellaneous receipts not deposited in bank accounts	123.76	544.02
Repayment of loans		1,000.00
Proceeds of Company check cashed		15,000.00
Total	$ 123.76	$16,544.02
Total unexplained private expenditures	$81,078.43	$70,243.66
Less: Credit given for allowable deductions in connection with equipment alleged stolen—not claimed on income tax return	1,167.20	473.90
Amount alleged by Government in the indictment not reported by the defendant in his income tax return	$79,911.23	$69,769.76

	1945 Count I	1946 Count II
Viz: Amount alleged in indictment as taxpayer's net income for the year	105,077.90	113,748.77
Net income reported in tax return	25,166.67	39,679.01
Amount alleged as not reported by taxpayer defendant	$79,911.23	$74,069.76
Differences	0	4,300.00

Dated this 22d day of April, 1952.

JOHN A. CARVER,
United States Attorney for the District of Idaho

/s/ DUDLEY L. WILSON,
Special Asst. U. S. Attorney for the District of Idaho

Acknowledgment of Service attached.

[Endorsed]: Filed April 22, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT FOR ACQUITTAL AT CLOSE OF PLAINTIFF'S CASE

Now comes Austin F. McFee, defendant above named, and at the close of evidence and testimony on behalf of the plaintiff, United States of America, and the attorney for the plaintiff, having stated to the Court that plaintiff rested and had completed its case in chief, and moves this Honorable Court through his attorneys of record to enter the order of judgment of acquittal of the offense charged in

Count One of the indictment against the said defendant Austin F. McFee, on the grounds and for the reasons:

1. That plaintiff has wholly failed to prove and establish beyond a reasonable doubt, all of the material facts and allegations alleged in Count One of said indictment.

2. That the nature of evidence adduced in behalf of plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a nature as to exclude every reasonable hypothesis but that of guilty.

Now comes Austin F. McFee, defendant above named, and at the close of evidence and testimony on the behalf of the plaintiff, United States of America, and the attorney for the plaintiff, having stated to the Court that plaintiff rested and had completed its case in chief, and moves this Honorable Court through his attorneys of record to enter the order of judgment of acquittal of the offense charged in Count Two of the indictment against the defendant Austin F. McFee, on the grounds and for the reasons:

1. That plaintiff has wholly failed to prove and establish beyond a reasonable doubt, all of the material facts and allegations alleged in Count Two of said indictment.

2. That the nature of evidence adduced in behalf of plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a na-

ture as to exclude every reasonable hypothesis but that of guilty.

Dated this 28th day of April, 1952.

/s/ J. F. EMIGH,
/s/ HAROLD S. PURDY,
Attorneys for defendant, Austin F. McFee

[Endorsed]: Filed April 28, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL AT CLOSE OF ALL TESTIMONY

Comes now the defendant Austin F. McFee and at the close of all the evidence and testimony in this case, in behalf of the plaintiff, United States of America and in behalf of the defendant, Austin F. McFee and after the respective counsel for the United States of America and said defendant have stated with the Court that each of said parties have rested and completed its case and moves this Honorable Court to order the entry of judgment of acquittal of all offenses charged in the entry of judgment of acquittal of all offenses charged in the indictments on the following grounds and for the following reasons:

1. That plaintiff has wholly failed to prove and establish beyond a reasonable doubt, all of the material facts and allegations alleged in Count One of said indictment.

2. That the nature of evidence adduced in behalf of plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a nature as to exclude very reasonable hypothesis but that of guilty.

Comes now the defendant Austin F. McFee and at the close of all the evidence and testimony in this case, in behalf of the plaintiff, United States of America and in behalf of the defendant, Austin F. McFee, and after the respective counsel for the United States of America and said defendant have stated with the Court that each of said parties have rested and completed its case and moves this Honorable Court to order the entry of judgment of acquittal of all offenses charged in the indictments on the following grounds and for the following reasons:

1. That plaintiff has wholly failed to prove and establish beyond a reasonable doubt, all of the material facts and allegations alleged in Count Two of said indictment.

2. That the nature of evidence adduced in behalf of plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a nature as to exclude every reasonable hypothesis but that of guilty.

Dated this 30th day of April, 1952.

/s/ J. F. EMIGH,
/s/ HAROLD S. PURDY,
Attorneys for defendant Austin F. McFee

[Endorsed]: Filed April 30, 1952.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled cause, find the defendant, Austin F. McFee, Guilty on count one, and Guilty on count two, as charged in the indictment.

/s/ JAMES A. PAYNE,
Foreman

[Endorsed]: Filed May 1, 1952.

In the District Court of the United States, District of Idaho, Northern Division

No. 4412

UNITED STATES OF AMERICA

vs.

AUSTIN F. McFEE

JUDGMENT AND COMMITMENT

Indictment in two counts for violation of U.S.C., Title 26, Sec. 145(b) Internal Revenue Code.

On this 1st day of May, 1952, came the United States Attorney, and the defendant Austin F. McFee appearing in proper person, and by counsel and,

The defendant having been convicted on verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar years

1945 and 1946, and the defendant having been now asked whether he has anything so say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year and 6 months and pay a fine of $7,500 on count 1, and one year and 6 months and pay a fine of $7,500 on count 2, and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that imprisonment on count 2 run consecutive to term of imprisonment on count 1. It is ordered that imprisonment on count 2 be suspended, and defendant placed on probation for 2 years, said probation period to begin after serving sentence on count 1. One of the conditions of the probation is that the defendant pay the amounts due the government on income tax.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed May 1, 1952.

[Title of District Court and Cause.]

ORDER

Upon application of counsel for the defendant, and good cause appearing,

It Is Ordered That sentence of imprisonment be stayed up to and including July 1, 1952 upon payment of fines, by 4 o'clock p.m., May 2, 1952, of $7,500 on count 1 and $7,500 on count 2.

Dated at Coeur d'Alene, Idaho, this 2nd day of May, 1952.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed May 2, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

1. Name and address of Appellant: Austin F. McFee, Samuels Hotel, Wallace, Idaho.

2. Names and addresses of appellant's attorneys: Harold S. Purdy, P.O. Box 301, Coeur d'Alene, Idaho; J. F. Emigh, 47 North Main Street, Butte, Montana.

3. Offenses: Violation: Title 18, USCA, Section 145(b) - Section 145(b) Internal Revenue Code; Wilful attempt to defeat and evade income tax, County One—year 1945; Title 18, USCA, Section 145(b) - Section 145(b) Internal Revenue Code;

Wilful attempt to defeat and evade income tax, Count Two—year 1946.

4. Date of judgment: May 1, 1952.

5. Brief description of judgment and sentence: (a) Adjudged, convicted upon verdict of guilty of offense of wilfully and knowingly, attempting to defeat and evade income taxes for calendar year 1945 by filing false and fraudulent tax returns, as charged in Count One of the indictment. Adjudged that appellant be committed to custody of Attorney General for 18 months and pay a fine of $7,500.00. (b) Adjudged, convicted upon verdict of guilty of offense of wilfully and knowingly, attempting to defeat and evade income taxes for calendar year 1946 by filing false and fraudulent tax returns, as charged in Count Two of the indictment. Adjudged that appellant be committed to custody of Attorney General for 18 months and pay a fine of $7,500.00.

6. Not confined.

I, Austin F. McFee, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment above mentioned.

Dated May 12, 1952.

/s/ AUSTIN F. McFEE,
Appellant

[Endorsed]: Filed May 12, 1952.

[Title of District Court and Cause.]

APPEARANCE BOND

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of Ten Thousand Dollars ($10,000.00).

The condition of this bond is that the defendant Austin F. McFee is to appear in the District Court of the United States for the District of Idaho at Coeur d'Alene, Idaho, in accordance with all orders and directions of the Court relating to the appearance of the defendant before the Court in the case of United States vs. Austin F. McFee, File number N-Cr., 4412; and if the defendant appears as ordered, then this bond is to be void, but if the defendant fails to perform this condition payment of the amount of the bond shall be due forthwith. If the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the United States for the District of Idaho against each debtor jointly and severally for the amount above stated together with interests and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

This bond is signed on this 20th day of June, 1952, at Boise, Idaho.

Name of Defendant: Austin F. McFee, Samuels Hotel, Wallace, Idaho.

Name of Surety: G. R. McGill, Route No. 1, Boise, Idaho.

Name of Surety: Casilda Legueniche, 1515 Franklin, Boise, Idaho.

Signed and acknowledged before me this 20th day of June, 1952.

/s/ ED. M. BRYAN

Approved as to Sureties: /s/ Ed. M. Bryan, Clerk.

[Endorsed]: Filed June 20, 1952.

[Title of District Court and Cause.]

DOCKET ENTRIES

1951

Nov. 8—File Indictment.

Nov. 8—Issue Warrant.

Nov. 17—File Warrant—Defendant arrested.

1952

Apr. 1—File Motion to Dismiss Indictment.

Apr. 1—Arraigned—pled not guilty as to Counts 1 and 2.

Apr. 1—Trial set for 10 a.m., Apr. 22, 1952, bond continued.

Apr. 1—File Notice of Motion for Bill of Particulars.

Apr. 2—File Notice of Amended and Supplemental Motion for Bill of Particulars.

Apr. 2—Order for Bill of Particulars.

Apr. 3—File Bill of Particulars.

1952

Apr. 4—File Motion for Continuance.
Apr. 4—File Affidavit of Harold S. Purdy.
Apr. 4—File Affidavit of J. F. Emigh.
Apr. 4—Order Overruling Motion for Continuance.
Apr. 22—File Amended Bill of Particulars.
Apr. 22—Record of Jury Trial.
Apr. 23—Record of July Trial.
Apr. 24—Record of Jury Trial.
Apr. 25—Record of Jury Trial.
Apr. 28—Record of July Trial.
Apr. 28—File Motion for Judgment for Acquittal at close of Plff's Case.
Apr. 29—Record of Jury Trial.
Apr. 29—File Plaintiff's Requested Instructions.
Apr. 29—File Defendant's Requested Instructions.
Apr. 30—Record of July Trial.
Apr. 30—File Motion for Judgment of Acquittal at close of all testimony.
May 1—Record of Jury Trial.
May 1—File Verdict—Guilty on both counts.
May 1—Record of Sentence.
May 1—File Judgment—$7,500 fine and 1 year and 6 months on count 1; $7,500 fine and 1 year and 6 months on count 2; imprisonment on count 2 consecutive to count 1. After service on count 1 deft. probated for 2 years. (Imprisonment on fine) (Deft. to pay income tax due government.)
May 1—Issue Commitment.
May 2—File Order Staying imprisonment to July 1, 1952.

1952

May 12—File Notice of Appeal.

May 12—(Copy to U. S. Attorney.)

June 17—File Order Extending Time for Appeal to August 5, 1952.

June 20—Order Fixing Bond of Defendant at $10,000.

June 20—File Bond—$10,000.00.

July 24—File Designation of Record on Appeal.

July 24—File Affidavit of Service.

July 24—File Order Extending Time for Appeal.

July 24—(Copies to U. S. Court of Appeals, U. S. District Attorney, J. F. Emigh and Harold S. Purdy.

July 25—File Transcript of Testimony.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor,

It is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit, and the same is extended to August 5, 1952.

Dated: June 17, 1952.

/s/ CHASE A. CLARK,
District Judge for the District of Idaho

[Endorsed]: Filed June 17, 1952.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor,

It Is Ordered That the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is extended to August 15, 1952.

Dated at Boise, Idaho, this 24th day of July, 1952.

/s/ CHASE A. CLARK,
United States District Judge

[Endorsed]: Filed July 24, 1952.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP), to-wit:

1. Indictment.
2. Motion to Dismiss Indictment.
3. Notice of Motion for Bill of Particulars.
4. Notice of Amended and Supplemental Motion for Bill of Particulars.

5. Order for Bill of Particulars (Minute Entry of April 2, 1952).

6. Bill of Particulars.

7. Motion for Continuance.

8. Affidavit of Harold S. Purdy.

9. Affidavit of J. F. Emigh.

10. Order overruling Motion for continuance (Minute Entry of April 4, 1952).

11. Amended Bill of Particulars.

12. Motion for Judgment for Acquittal at close of Plaintiff's Case.

13. Defendant's Request for Instructions.

14. Motion for Judgment of Acquittal at close of all Testimony.

15. Verdict.

16. Judgment.

17. Order Staying Execution of Sentence.

18. Notice of Appeal.

19. Bond in the sum of $10,000, pending determination of appeal.

20. Reporter's Transcript of Testimony.

21. Original Exhibits Nos. 1 to 28 inclusive, 30 to 55 inclusive, and 56, 57 and 58.

22. List of docket entries.

23. Orders (2) extending time to file Transcript on Appeal in the Appellate Court.

24. Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this 7th day of August, 1952.

[Seal] /s/ ED. M. BRYAN, Clerk

In the United States District Court for the District of Idaho, Northern Division

No. 4412

UNITED STATES OF AMERICA, Plaintiff,

vs.

AUSTIN F. McFEE, Defendant.

TRANSCRIPT

This matter came on for trial before the Honorable Chase A. Clark, United States District Judge, sitting with a jury at Coeur d'Alene, Idaho, on April 22, 1952.

Appearances: John A. Carver, Esq., United States District Attorney, Boise, Idaho, Herman Rossi, Esq., Asst. U. S. District Attorney, Boise, Idaho, W. W. Patten, Esq., Spec. Asst. U. S. District Attorney, Seattle, Wash., Dudley L. Wilson, Esq., Spec. Asst. U. S. District Attorney, Spokane, Wash., Attorneys for the Plaintiff. J. F. Emigh, Esq., Butte, Montana, Harold S. Purdy, Esq., Coeur d' Alene, Idaho, James P. Keane, Esq., Wallace, Idaho, Attorneys for the Defendant.

G. C. Vaughan, Reporter, Boise, Idaho. [1*]

April 22, 1952, 10:00 o'clock a.m.

(Examination of jury reported but not transcribed.)

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* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

After the jury was selected and duly sworn the following proceedings were had.

(The Court admonished the jury and a recess was taken until 10:00 o'clock.)

10:00 o'colck, April 24, 1952

(Opening statement by Mr. Patten.)

(It was stipulated between counsel that the original exhibits may be withdrawn and copies or photostats substituted in place of originals.)

JOHN S. PETERSON

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Patten): What is your address?

A. Boise, Idaho.

Q. Will you give us your full address?

Mr. Emigh: Let the record show that the defendant objects to the introduction of any evidence on the ground and for the reason that count one of the indictment does not state facts sufficient to constitute a crime or a public offense; particularly the offense charged in count one.

And also makes the same objection as to the introduction of evidence concerning count two on the ground that count two of the indictment does not state facts sufficient to constitute a crime or public offense particularly the offense charged.

The Court: Do you wish to be heard on this?

Mr. Emigh: No, Your Honor.

(Testimony of John S. Peterson.)

The Court: I will hear you anyway, what have you to say?

Mr. Emigh: I only wish to state for the record that as a matter of law the defendant cannot waive the question whether or not the indictment states a public offense.

The Court: In other words you have something in the back of your mind that something is wrong with the indictment and you do not want to tell the Court about it at this time.

Mr. Emigh: I will say that it is my belief as an attorney that this indictment is sufficient under the rules as laid down by the Circuit Court of Appeals of the United States at the present time.

The Court: Then you have nothing to say at this time.

Mr. Emigh: I have not, there are no mental reservations [2] on my part but I do feel that it is my duty to preserve the record because I think that the question raised cannot be waived and I do not want to be placed in the position of not protecting my client's rights.

The Court: And your thought is that you should object to everything whether you have a ground for your objection or not.

Mr. Emigh: No, Your Honor, that is not my purpose but I do feel that the record should be protected on this matter.

The Court: You have now made one objection and you say that you think it is not a good objection.

(Testimony of John S. Peterson.)

Mr. Emigh: But I do say that it is something that cannot be waived.

The Court: Then why make the objection when you say that under the decisions of our higher court it is a good indictment?

Mr. Emigh: I just want to be sure as attorney for my client that I have protected the record.

The Court: It seems that you just want to object.

Mr. Emigh: That is not the case, Your Honor.

(The foregoing remarks of court and counsel were made after the jury was excused.)

The Court: You may recall the jury, Mr. Bailiff.

(The following in the presence of the jury.)

The Court: I think I probably should tell you ladies and gentlemen of the jury that during the course of this trial it will be necessary for you to be excused when matters of law are presented to the Court but that is one way you will get a little exercise.

Q. Will you now give us your full address?

A. 321 Eiden St., Boise, Idaho.

Q. What is your position or occupation?

A. I am the assistant chief field deputy of the Internal Revenue Service of Idaho.

Q. How long have you been employed by the Collector of Internal Revenue in the collection district of Idaho?

A. A little over 18½ years.

Q. And where is the collector's office located?

A. Boise, Idaho.

Q. How long has it been in Boise?

(Testimony of John S. Peterson.)

A. Since 1919.

Q. Mr. Peterson, we have asked you to bring certain documents from the collector's office; will you give them to bailiff? A. Yes, sir.

Mr. Patten: I would like these to be marked, this first as plaintiff's Exhibit No. 1 for identification.

Mr. Patten: Your Honor, while counsel is examining that exhibit I might say that it will be necessary to introduce a number of the official records of the Collector's office, they are the original business records and I would like to [4] have a stipulation that we may withdraw the original documents and substitute photostatic copies of those documents.

Mr. Emigh: We have no objection to that.

The Court: Then it may be understood that photostatic copies may be substituted of any of the exhibits where that is desired.

Mr. Patten: I have been informed that some of the copies are not available for examination at this time but will be.

The Court: It may be understood that copies may be introduced at any time.

Q. Mr. Peterson, can you identify that document for the Court and jury? A. I can.

Mr. Emigh: I wonder if this has been offered.

Mr. Patten: Not yet.

The Court: You may go ahead.

A. This is the 1945 individual income tax return, serial no. 9099032 filed in the office of the Collector

(Testimony of John S. Peterson.)

of Internal Revenue for the District of Idaho in the name of A. F. McFee.

Q. Can you tell us when it was returned?

A. March 11, 1946.

Mr. Patten: I will not offer it in evidence at this time. I will ask that this be marked as plaintiff's Exhibit No. 2. [5]

Q. Now, will you identify the document which has been handed to you?

A. This is the individual income tax return for the calendar year of 1946: Serial No. 304053 filed in the office of the Collector of Internal Revenue for the District of Idaho. It is in the name of A. F. McFee.

Q. And when was that return filed?

A. March 15, 1947.

Mr. Emigh: May I examine the witness on this for a moment?

The Court: Yes, you may.

Q. (By Mr. Emigh): This exhibit is not in the condition that it was at the time it was received, is it Mr. Peterson?

A. So far as I know, it is.

Q. To your knowledge were these red markings on there when this exhibit was received or were they placed on there by some member of the Department?

A. They were placed on there by some member of our department.

Q. I was referring to the first page?

A. Yes, sir.

(Testimony of John S. Peterson.)

Q. That would not be true of the red markings on the second page?

A. I would say that they were on there when the return was filed. [6]

Q. And that is true of the markings on the third page, they were placed on there by your department? A. These check marks were.

Mr. Emigh: I think unless these markings are deleted that have been placed there by the Department that we object to this exhibit, I will ask another question.

Q. Were these blue markings put on there by your department? A. I believe so.

Mr. Emigh: I will object to that.

The Court: ——There is nothing before the Court at this time.

Mr. Emigh: Let the record show that the objection now being made is to the introduction of this exhibit unless the markings placed on there by members of the Internal Revenue Department are deleted.

The Court: I will not rule on that objection at this time as I don't believe there is any offer and there is nothing before the Court.

Q. (By Mr. Patten): What was the first year that Mr. McFee filed a return with your office, do you know? A. Yes, sir.

Q. What year was that? A. 1936.

Q. And for what years between that and 1945 did he file returns? [7]

(Testimony of John S. Peterson.)

A. He filed for each and every year from 1936 to 1945.

Mr. Patten: I will ask that this group of three documents be marked for identfification as Exhibit No. 3.

The Court: If you want them marked separately as 3, 4 and 5 you may go on with your examination.

Mr. Patten: Then with the understanding that they are so marked, I will examine if it is agreeable with your Honor.

The Court: They will be marked by the Clerk, you may go ahead.

Q. In reference to Exhibit No. 3 I will ask you if that exhibit ——

The Court: I will ask you to refrain from making the objection until the exhibits are offered in evidence after they have been identified and you may cross-examine before making the objection as to any particular exhibit.

Mr. Patten: The Government will concede, if the Court please, that there is nothing before the Court at this time.

The Court: Let's go on with the examination.

Q. Mr. Peterson will you identify the first document which has been handed you now and marked as Exhibit No. 3?

A. This is the income tax return for the calendar year of 1942; Serial No. 42232; filed in the office of the Collector of Internal Revenue for the District of Idaho [8] in the name of A. F. McFee.

(Testimony of John S. Peterson.)

Q. And will you identify plaintiff's Exhibit No. 4 marked for identification?

A. Exhibit No. 4 is the individual income tax return for the calendar year of 1943; Serial No. 902500; that is filed in the office of the Collector of Internal Revenue for the District of Idaho in the name of A. F. McFee.

Q. Now go ahead and identify Exhibit No. 5.

A. Exhibit No. 5 is an individual income tax return for the calendar year of 1944; Serial No. 908557; filed in the office of the Collector of Internal Revenue for the District of Idaho in the name of A. F. McFee.

Q. Mr. Peterson, we requested you to bring Mr. McFee's returns for the years 1936 to 1941, do you have those with you? A. No, sir.

A. And where are those?

A. They are destroyed.

Q. Why were they destroyed?

A. That was under orders of the Commissioner of Internal Revenue at Washington, D. C.

Q. Will you explain that to the jury.

Mr. Emigh: May we object to this as not proper examination to determine anything upon which the Government can establish the corpus delicti.

The Court: The objection is overruled. [9]

Q. You may go ahead with the answer.

A. That was destroyed under orders of the Commissioner of Internal Revenue at Washington, D. C. under an act of Congress dated July 7, 1943 wherein authority was given to the Commissioner

(Testimony of John S. Peterson.)

of Internal Revenue to destroy certain income tax returns, particularly those over six years old or had been in the files of the Commissioner or the various Collectors throughout the country for a period of over six years and under that authority the Commissioner of Internal Revenue ordered the Collectors for Idaho to destroy the returns which you referred to here and which I did not bring with me.

Mr. Patten: I will ask now that the next document be identified as Exhibit No. 6.

The Court: Just hand it to the witness.

Q. Will you identify that document?

A. That is a partnership income tax return for the calendar year 1942; the Serial No. is 972642. It is filed in the office of the Collector of Internal Revenue for the District of Idaho in the name of North Idaho Sales Co.

Q. You say that is a partnership return?

A. Yes, sir.

Q. Now, Mr. Peterson will you identify what has been handed to you and marked as plaintiff's Exhibit No. 7 for identification?

A. Yes, this is marked as defendant's Exhibit No. 7. [10]

Mr. Patten: I beg your pardon, now, it is marked as Plaintiff's Exhibit No. 7.

A. This exhibit is a partnership income tax return for the calendar year 1943, Serial No. 970797 and it is filed in the office of the Collector of In-

(Testimony of John S. Peterson.)

ternal Revenue for the District of Idaho, in the name of North Idaho Sales Co.

Q. We requested you to bring the returns from the Collector's office filed either in the name of North Idaho Sales Co. or— May I withdraw that please?

Q. What was the first year that the partnership, composed of A. F. McFee and Dorothy McFee, doing business as North Idaho Sales Co. filed a return with the Internal Tax Revenue at Boise?

A. That was in 1936.

Q. And for what year was that?

A. Under the name of A. F. and Dorothy McFee, this partnership filed returns for 1936 through 1940 each and every year.

Q. Do you have those returns with you?

A. I do not.

Q. Will you tell the jury why you don't have those returns?

Mr. Emigh: We make the same objection, that it is incompetent, irrelevant and immaterial at this time, and it is improper examination, it is nothing upon which the corpus delicti can be determined.

The Court: The same ruling, he may answer.

A. Because they have been destroyed under the authority of the [11] same order that I mentioned, of the Commissioner of Internal Revenue.

Mr. Patten: I ask that this exhibit be marked as plaintiff's Exhibit No. 8 for identification.

Q. Will you tell the jury what the document

(Testimony of John S. Peterson.)

is that you have in your hand at this time which is marked as No. 8?

A. Exhibit No. 8 is a partnership income return, income tax return for the calendar year 1945, the Serial No. is 873126; it is filed in the office of Collector of Internal Revenue for the District of Idaho in the name of Dan-MacLease.

Mr. Patten: I ask that this next document be marked as Exhibit No. 9.

Q. Will you identify that Mr. Peterson?

A. Exhibit No. 9 is a partnership income tax return for the calendar year 1946, Serial No. 883226, filed in the office of the Collector of Internal Revenue for the District of Idaho in the name of Dan-MacLease.

Q. Mr. Peterson can you tell us the total amount that Mr. A. F. McFee and Dorothy McFee paid into the Collector's office in the years 1936 to 1941?

Mr. Emigh: We object to that as the proper foundation has not been laid and we object until such foundation is laid showing what this witness purports to base his conclusion on. Until such time affirmatively shown that he has knowledge [12] of the things that he is requested to give a conclusion on, the proper foundation is not laid here and it is incompetent, irrelevant and immaterial, it is secondary evidence.

The Court: Yes, I think this should be shown from the records.

Q. Mr. Peterson you have records of the pay-

(Testimony of John S. Peterson.)

ments made in the name of A. F. McFee and Dorothy McFee for the years 1936 to 1941?

A. I do.

Q. Will you consult that record?

A. Yes, sir.

Q. Is this an official record from the office of the Collector of Internal Revenue for the District of Idaho?

A. It is an official transcript of the payments made by those individuals for those years, and certified by the Collector before I left Boise to come to Coeur D' Alene to attend this trial I compared this with the original in the office of the Collector of Internal Revenue and I compared them so that I know that the figures in this transcript are the same as shown by the official record and the original record.

Mr. Emigh: We object, and it is on the same ground, that the proper foundation is not laid as to who prepared the record and what this was prepared from and the knowledge of the person certifying this document and that it was prepared from the tax returns, that is that the original record was [13] prepared from the original income tax returns which I now claimed to be destroyed so that he can say that they are from the returns.

Mr. Patten: The supporting records of the payments made are kept in the office.

Mr. Emigh: Do you expect to connect this up?

Mr. Patten: I am offering this to show what hap-

(Testimony of John S. Peterson.)

pened to the income tax Mr. McFee claimed that he paid.

Mr. Emigh: We object to this, your Honor, the bill of particulars filed in this case states that this evidence will be based on the income tax returns and not on payment books, and we object on the ground that the Government is limited by the bill of particulars, we object to this on the ground that the evidence is beyond the bill of particulars here.

The Court: It will be admitted only insofar as it supports the bill of particulars.

Mr. Emigh: We have the further objection that they are not in evidence, I am calling the Court's attention to the fact that none of the exhibits are admitted in evidence at this time. We have a stipulation that copies may be substituted but we think that the exhibits should be admitted in evidence if they are to be testified from in this case.

Mr. Patten: May I have this marked as plaintiff's [14] exhibit?

The Court: Yes, the Clerk will mark it.

A. There are two separate certificates here, in fact there are three of them.

Q. Would you identify Exhibit No. 11.

A. Plaintiff's Exhibit No. 11——

Q. Just a moment, may I start with No. 10, will you identify Exhibit No. 10?

A. Plaintiff's Exhibit No. 10 is a certificate of assessments and payments of income taxes by A. F. McFee for the years 1942, '43, '44, '45, '46 and '47.

Q. By whom is that record signed?

(Testimony of John S. Peterson.)

A. By John R. Viley, Collector of Internal Revenue for the District of Idaho.

Mr. Patten: I offer the exhibit in evidence at this time.

Mr. Emigh: May we examine this exhibit?

The Court: Yes you may.

Mr. Emigh: I think we still object on the same ground and the same reasons. I object for the reason that it is not based upon the income tax returns reported and they are not reported to be lost or anything of that sort, it is apparently a statement of payments and not of taxes due or reported and does not take the place of the exhibits which have not been introduced and it is not only secondary evidence, [15] but it is not the official records and it is incompetent, irrelevant and immaterial and there is no proper foundation laid for any such evidence.

The Court: It may be admitted with the understanding that where the original, if it has not been destroyed under the order heretofore mentioned, that the original will be introduced, and if not, then it will be stricken.

Mr. Patten: We are not offering that as evidence of the amount which was reported on the McFee returns or what was in the returns, this is the collector's record of the money that he received from McFee and has nothing to do with the contents of those returns.

The Court: I have admitted it with the understanding that where ever there are original records they will be introduced.

(Testimony of John S. Peterson.)

Mr. Patten: I am sorry, I missed that ruling.

The Court: I will expect you to follow this up with the originals, I realize of course that all of this cannot be put in at once.

Mr. Patten: I will endeavor to follow your Honor's ruling.

Q. Will you identify Exhibit No. 11.

A. Plaintiff's Exhibit No. 11 is a certificate of assessments and payments, certified to by John R. Viley, Collector of Internal Revenue for the District of Idaho, showing the assessments made against A. F. McFee and the payments [16] made by him for the years 1936 through 1941.

Mr. Patten: We offer Exhibit No. 11 in evidence.

Mr. Emigh: May the same objection be made to this as was made to Exhibit 10 and the further objection that it goes beyond the bill of particulars as to the mode of proof.

The Court: Is this a part of the records and files in your office?

A. Yes they are.

The Court: It may be admitted.

Q. Now, Mr. Peterson, will you identify Exhibit No. 12?

A. Exhibit No. 12 is a certificate of assessment and payment by Dorothy McFee certified to by John R. Viley, Collector of Internal Revenue for the District of Idaho for the years 1936 through 1943.

Mr. Patten: I am not going to offer that in evidence at this time. You may cross-examine.

(Testimony of John S. Peterson.)

Cross-Examination

Q. (By Mr. Emigh): You stated that no income tax return was filed by Mr. McFee prior to 1933?

A. No, I didn't say that.

Q. Then what was your statement?

A. I think I said that he filed income tax returns for each and [17] every year from 1936 to 1946 or through 1945.

Q. Just preceeding that didn't you make the statement that he had not filed a tax return prior to 1936?

A. I think I said that 1936 was the first year he filed.

Q. You didn't imply that there was none filed prior to that time?

A. In the District of Idaho, he may have filed someplace else, he could have done that alright.

Q. You didn't say that; do you now say that you don't know whether he filed in some other place?

A. So far as Idaho is concerned the first return was filed in 1936.

Q. But you do not know whether he filed some other place prior to 1936?

A. That is correct, I do not know.

Q. Can you say that he didn't in 1924 file a report in Idaho?

A. I don't have any knowledge of that.

Q. You haven't checked prior to 1936?

A. We have in the District of Idaho.

(Testimony of John S. Peterson.)

Q. That is what I am saying, in Idaho.

A. The records show that the first return filed in the District of Idaho was in 1936, that is by McFee.

Mr. Emigh: I believe that is all.

Mr. Patten: You may be excused, Mr. Peterson.

The Court: At this time we will recess until 1:45. [18].

1:45 o'clock p.m., April 23, 1952

WILFORD J. EMASIO

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you state your full name? A. Wilford John Emasio.

Q. And now will you give your address?

A. 816 Maple, Wallace, Idaho.

Q. And your occupation?

A. At the present time I am manager of the Whitten Mineral Co. and Secretary-Treasurer of the Lucky Friday Mining Co. of Wallace, Idaho, and I do a little private accountancy on the side.

Q. How long have you been engaged in the accounting work?

A. Well possibly since 1925 or '26.

Q. During all of that time where were you located? A. At Wallace, Idaho.

(Testimony of Wilford J. Emasio.)

Q. Do you prepare income tax returns in connection with your accounting work?

A. Yes, sir. [19]

Q. Do you know the defendant in this proceeding, Mr. A. F. McFee? A. Yes, sir, I do.

Q. I hand you this document, and I will ask you if you recognize plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. Is that your signature on the first page?

A. Yes, sir, it is.

Q. Are you familiar with that?

A. Yes, sir.

Q. I mean the other signature on that page?

A. Yes, sir.

Q. You say you are familiar with it?

A. Yes sir.

Q. Whose signature is that?

A. Mr. A. F. McFee.

Q. Did you see Mr. McFee sign that return?

A. Yes, sir.

Q. That is his return? A. Yes, sir.

Q. Did you prepare that? A. Yes, sir.

Mr. Patten: I offer this in evidence now as plaintiff's Exhibit 1.

The Court: And that A. F. McFee, whose signature is on the first page as you testified, he is the same McFee as the defendant here? [20]

A. Yes, sir, it is.

Mr. Purdy: We have no objection to the offer.

The Court: It may be admitted.

Q. Mr. Emasio, will you examine Exhibit No.

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(Testimony of Wilford J. Emasio.)

2 now and tell the jury if you know what it is, do you recognize that document?

A. Yes, sir.

Q. Did you prepare it? A. Yes, sir.

Q. And is your signature on the first page?

A. Yes, sir.

Q. Is there another signature on that page?

A. Yes, sir.

Q. Are you familiar with the second signature on the first page? A. Yes, sir.

Q. Whose signature is that?

A. A. F. McFee.

Q. And is that the defendant in this proceeding, the gentleman who is sitting here (indicating)?

A. Yes, sir.

Q. Did you see him sign that return?

A. Yes, sir.

Mr. Patten: We offer this as Exhibit No. 2.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Q. Mr. Emasio you have been handed exhibits Nos. 3, 4, and 5, will you please examine plaintiff's Exhibit No. 3 and tell [21] the jury if you also prepared that return? A. Yes, sir.

Q. And does that also bear the signature of Mr. McFee? A. Yes, sir.

Q. Now would you please examine plaintiff's Exhibit No. 4 and tell us the same about that, that is, if it is true?

A. Yes, the same is true about this, I signed as a witness to the signature of Mr. A. F. McFee.

(Testimony of Wilford J. Emasio.)

Q. Now then will you examine Exhibit No. 5 and tell us about that?

A. The same is true, I signed that as a witness to Mr. McFee's signature.

Q. That is your signature on the instrument?

A. Yes, sir.

Q. And the other is the signature of Mr. A. F. McFee, the defendant here? A. Yes, sir.

Mr. Patten: I don't propose to burden the record with all of these exhibits at this time, they will be available to be used by the agents in their computation here later.

Upon reconsideration of that, I would like to move the admission of these exhibits, 3, 4, and 5.

Mr. Purdy: We have no objection.

The Court: They may be admitted.

Q. Now, Mr. Emasio, you have been handed Exhibit No. 1 again. Will you tell the Court and jury the sources of the income [22] reported on this return?

Mr. Purdy: I think the return speaks for itself.

Mr. Patten: This man is an expert accountant, I also wish to lay the basis for some further questioning.

The Court: He may answer the question.

Q. Now then, will you enumerate the source of the income listed on the return?

A. How do you mean, make a direct question and I will answer.

Q. The first figure which appears is item number three on the return.

A. Yes, $2,674.93.

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(Testimony of Wilford J. Emasio.)

Q. And what is that?

A. I will have to dig through them to see.

Q. On the form what is that?

A. That is dividends and interest.

Mr. Purdy: May we have the objection to this line of testimony, that is, the exhibit speaks for itself.

The Court: I was wondering if it would save time to read the exhibit to the jury.

Mr. Patten: My primary purpose is to ascertain where the witness obtained the figures that he put in the return.

Q. Would you read the item, the figure you used?

A. The total amount of dividends and interest, the total, $2,674.93.

Q. Where did you obtain that? [23]

A. From the bank deposit records, from funds put in the First National Bank of Wallace, Idaho, from the books set up or the duplicate deposit slips attached to the deposit book.

Q. And this figure reflects the dividends and interest deposited in the First National Bank of Wallace, Idaho? A. Yes, sir.

Q. Now would you turn to page 2, schedule B and read that item and amount.

A. Buildings.

Q. In the second column?

A. You mean here at the end?

Q. I mean the amount of rents.

A. $5,005.00.

(Testimony of Wilford J. Emasio.)

Q. Where did you obtain that figure?

A. From the same source as the other.

Q. That is the funds in the First National Bank of Wallace, Idaho? A. Yes, sir, the same.

Q. And this reflects the amount of rent deposited in the Bank account? A. Yes, sir.

Q. Under schedule C read the total receipts.

A. The North Sales Co. $248,103.34.

Q. Where did you obtain that figure?

A. From the cash book that was furnished from the North Idaho [24] Sales Co. Office.

Q. Did you prepare the books for the North Idaho Sales Co. for the year 1945?

A. No, I told you that I got these receipts from the books furnished by their office.

Q. And who furnished you with those books?

A. I don't know who it was at that time, but it was furnished from a book there.

Q. You did keep certain records of the North Idaho Sales Co. during the year 1945?

A. You confuse me, I don't know what you mean.

Q. Did you keep a ledger of the North Idaho Sales Co.? A. Yes, sir, a general ledger.

Q. From your knowledge of the North Idaho Sales Co. operations do you know what were the original records from which the book was prepared from which you got this information?

A. It was furnished out of the North Idaho Sales Company's office by their employees and dis-

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(Testimony of Wilford J. Emasio.)

tributed and totalled up and I ran them in the general ledger.

Q. And do you know from what the figure was compiled?

A. Receipts from phonograph, from slot machines, and sales of machines.

Q. And this was a summary figure?

A. Yes, sir.

Q. How often did you receive that from North Idaho Sales Co.? [25]

A. Once a month.

Q. Do you know what the basis was that the employee of the North Idaho Sales Company compiled her figures from that she gave you?

A. From the collections made by the outside men.

Q. And will this figure reconcile with any other records?

A. With the bank deposits, yes sir.

Q. And do you know if the figure which the employee of the North Idaho Sales Co. gave you was compiled from the bank deposits? A. Yes, sir.

Q. The figure which you use here reconciles with the bank deposits?

A. Yes, sir, of the North Idaho Sales Co.

Q. What were these bank deposits, where were they carried?

A. Two banks, this figure that you are asking about now.

Q. Just the North Idaho Sales Co.?

(Testimony of Wilford J. Emasio.)

A. A portion in Coeur d' Alene, Wallace and Lewiston.

Q. Where was the account carried in Wallace?

A. In the Idaho First National.

Q. And where was it carried in Coeur d' Alene?

A. The Idaho First National.

Q. And in Lewiston?

A. In two banks there, the First Security and the Idaho First National.

Q. Did they have accounts in both banks? [26]

A. At one time in the First Security and the second time I think it was the Idaho First National.

Q. Now will you turn to the schedule gains and losses, schedule D, this document shows $16,818.76, it reflects $16,818.76, reflects capital gain of that amount, will you explain where you obtained those figures?

A. The sales of pin balls and slots. I don't know whether I should go into the depreciation on the different lines, some were sold and then some were purchases, from 1937 to 1943, the pin balls and slots, and a 1936 Ford coupe——

Q. Where did you get the sales figures?

A. From the office of the North Idaho Sales Co.

Q. Are those from the books of the North Idaho Sales Co.? A. Yes, sir.

Q. Were there any other records?

A. An audit of the Gem Club of Athol, Idaho and another item on there is machines destroyed or stolen.

(Testimony of Wilford J. Emasio.)

Q. If you were checking the books there, is it your statement now that you obtained these statements or figures from the books of the North Idaho Sales Co.? A. That is right.

Q. And what were those books posted or prepared from? A. From the actual sales.

Q. Where did the money go from the sales?

A. In the Idaho First National Bank of Wallace, Idaho.

Q. Would you turn to the profit and loss statement covering [27] the Gem Club?

A. Yes, I have it.

Q. Did you prepare this profit and loss statement? A. Yes, sir.

Q. Would you explain to the jury where you obtained the receipts figures? A. Yes, sir.

Q. Read it and explain where you obtained it?

A. Sales $6,307.78; slots $1,373.75; phonographs receipts $50.40, a total of $7,731.95.

Q. Where did you obtain that figure?

A. I think the manager of the club furnished it, he furnished the daily report receipts which was sent to the Coeur d' Alene office of the North Idaho Sales Co. and from that point the North Idaho Sales Co. lifted this out of the cash book.

Q. And was there any record with which this cash book could be reconciled? A. Yes, sir.

Q. Now will you give us the same information with respect to the Foresters Club in Lewiston, the receipts?

A. Yes. Sales $59,973.49; slots $14,670.47; cigar-

(Testimony of Wilford J. Emasio.)

ette machine $1,237.37; phonograph $1,986.79, making a total of $77,868.12.

Q. And where did you obtain that figure?

A. From the daily reports furnished from Lewiston to the North Idaho Sales Co. office at Coeur d' Alene. [28]

Q. And those could be reconciled?

A. Yes, sir.

Q. With what?

A. With the Idaho First National at Lewiston and Coeur d' Alene or it could be either, they could be reconciled with either bank.

Q. Now will you turn to the same with respect to the Foresters Club at Coeur d' Alene, Idaho.

A. Is this the original return, I got one here that I can not read.

Q. Maybe that I can help with this.

A. Yes, sales $19,161.28; slot machines $3,875.22; phonograph receipts $234.20 makes a total of $23,270.70.

Q. Where did you obtain those figures?

A. From the cash book furnished by the North Idaho Sales office out of Coeur d' Alene.

Q. And with records could that cash book be reconciled? A. With the bank record.

Q. Without going into each of these in detail, each of these earnings statements show a considerable amount of expenses in operating the business.

A. Yes, sir.

Q. Would you tell the court and jury where

(Testimony of Wilford J. Emasio.)

you obtained those figures, the expense figures of this business?

A. From the check book furnished from the same source that I got the income from. [29]

Q. And did you make a check of the spread from the original books?

A. No, these club girls would distribute it.

Q. From checks? A. Yes, sir.

Q. Did you keep an over-all record of this business? A. Yes, sir.

Q. And is this return in agreement with those records that you kept? A. Yes, sir.

Q. Are those records in agreement with the bank account? A. Yes, sir.

Q. What record was made of the amount of money that Mr. McFee withdrew out of this business, what amounts of money, if any, that he withdrew?

A. We charged him on his personal drawing account.

Q. That was part of the records of the North Idaho Sales Co.? A. Not necessarily.

Q. Was it a part of the records of those clubs?

A. He drew from the club and he was charged on the club books; it was no part of the North Idaho Sales Co.

Q. Mr. McFee had drawing accounts at several of those clubs? A. Yes, sir.

Q. Do you recall the clubs where he had drawing accounts?

A. At Athol, Coeur d' Alene and Lewiston.

(Testimony of Wilford J. Emasio.)

Q. And the North Idaho Sales Co.? [30]

A. Yes, sir.

Q. What other records were made of the amounts that Mr. McFee withdrew from the business? A. Meaning what?

Q. How was his drawing account posted?

A. Charged to him personally.

Q From what records was this records posted?

A. The withdrawals from any of those clubs or from the North Idaho Sales.

Q. What pieces of paper would the bookkeeper have in front of her to charge Mr. McFee's account?

A. Cash withdrawals and check withdrawals.

Q. And whether it was check or cash it would be charged to his account? A. Yes, sir.

Q. And you have stated that the books balanced? A. Yes, sir, they had to.

Q. Did they reconcile with this return?

A. Yes, sir.

Q. Is there any way in which Mr. McFee could have withdrawn funds from the business as recorded in those books without those withdrawals being recorded in his drawing account?

Mr. Purdy: We object to that as calling for a conclusion of the witness.

The Court: This is an expert, I think that I will [31] permit him to answer.

A. I cannot follow you closely, you mean, you go from one to the other and I don't follow you.

The Court: If you don't understand just state that you don't.

(Testimony of Wilford J. Emasio.)

A. No, I don't know how to answer that.

Q. If Mr. McFee was to draw on one of these banks and not report it in the books, would the books balance?

A. Not if he drew it from the bank account. If he drew it out of the funds, yes, he could make a withdrawal, yes sir.

Q. My question is, from these books as reflected in this business and as shown on the return and the books, could he have withdrawn any funds without being recorded on the drawing account?

A. No.

Q. Mr. Patten: Could we ask for a stipulation that any exhibit that has been admitted can be read to the jury.

The Court: Yes, that is understood, at any time during the argument or during the course of the trial you may read any portion of the exhibit admitted.

Mr. Emigh: I didn't get that.

Mr. Patten: I was asking for a stipulation that any portion of the exhibits may be read at any time.

Mr. Emigh: Yes, we will so stipulate.

The Court: Then it may be understood that any portion of the exhibit admitted may be read at any time during the course of the trial. [32]

Q. You have Exhibit No. 2, willl you read item No. 3 on this exhibit?

A. $2036.42.

Q. What is that?

(Testimony of Wilford J. Emasio.)

A. That is dividends.

Q. Where did you obtain that figure?

A. Deposit slips, duplicate deposit slips, funds deposited in the First National Bank of Wallace, Idaho.

Q. Would you read item 4 that you have?

A. $127.75.

Q. What is that figure?

A. That is interest income.

Q. Where did you obtain that figure?

A. I will have to look, but I would say that it was from the same source.

Q. Will you turn to schedule B and tell the jury where you obtained the figure for the rent that Mr. McFee received during 1946?

A. Duplicate deposit slips of deposits in the First National Bank of Wallace, Idaho.

Q. How much were those?

A. You mean gross or net?

Q. Give us the total, the gross.

A. $5,037.50.

Q. Referring to schedule C would you explain to the jury where you obtained the total receipts figure? [33]

A. The North Idaho Sales Co.

Q. And what was that figure?

A. $315,551.51.

Q. And how did you get that?

A. From the cash book furnished by the North Idaho Sales from the Wallace, Idaho office.

Q. From what was that prepared?

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(Testimony of Wilford J. Emasio.)

A. You mean how was it prepared?

Q. What record would it reconcile with?

A. The deposit slips furnished for receipts, deposited in the Idaho First National at Wallace, Idaho.

Q. Would you turn to the schedule of gains and losses and tell us——

A. ——Which is that?

Q. Schedule D on the long form.

A. Yes, I have that.

Q. Would you read the gain or loss?

A. $1,588.30.

Q. Where did you obtain that figure which goes into that computation, particularly the gross—change that question, please—where did you obtain the gross sales price used in this schedule?

A. From the North Idaho Sales office at Wallace, Idaho.

Q. Now will you turn to the profit and loss statement of the Samuals Hotel and read those figures; would you read the income figure from this statement and explain where you [34] obtained those. A. The income figures?

Q. The gross income. A. $11,341.21.

Q. Where did you obtain that figure?

A. These figures came from Mr. Randall the president of the Hecla Mining Co. and he was a public accountant at that time and he furnished those figures.

(Testimony of Wilford J. Emasio.)

Q. Do you know if those figures could be reconciled with some third party record?

A. Yes I would say so.

Q. With what record could they be reconciled?

A. I imagine with a set of books that were audited and checked by Mr. Randall and a statement furnished by Mr. Randall.

Q. Do you know if the Samuals Hotel had a bank account? A. I kept no record of it.

Q. Now will you turn to the Foresters Club at Lewiston, Idaho, that is, the statement of that club and read the income reported on that statement?

A. Do you want the list?

Q. Yes, if you please.

A. Sales $31,748.60; slot machine $15,923.96; phonographs $1,088.57; cigarette machine $478.35, total income $49,239.48.

Q. Will you tell the jury where you obtained those figures?

A. I think those were furnished by the manager of the club [35] which furnished daily report; it listed that income and the expenditures, wages, telephone, laundry and all, he furnished a daily report every day and those were sent up from Lewiston to the girl in the North Idaho Sales office once a week; from that point she made the distribution, distributed the income and those books were furnished to me, sent to Wallace once a month.

Q. And would those receipt figures reconcile with the deposit to any bank account?

A. Yes, sir.

(Testimony of Wilford J. Emasio.)

Q. What account was that?

A. It could be the Idaho First National or the First Security Bank.

Q. During the year 1946 did you keep Mr. McFee's general ledger? A. Yes, sir.

Q. Now, turn to the last page on this return.

A. What is that?

Q. I think it is page three, yes, read Mr. McFee's reported net income for the year 1946.

A. On page three?

Q. Item 3 I believe.

A. Yes I have it, $39,679.01.

Q. You stated prreviously that you kept Mr. McFee's general ledger for the year 1946?

A. Yes. [36]

Q. Will you tell the jury if the books that you kept would reconcile with this return or do they agree with these returns with the exception of the Samuals Hotel?

A. The North Idaho Sales was one operation, the Foresters Club was another, the club at Athol was another, I kept a general ledger for the three which was reflected on this return, they were separate books and they did not reflect on the North Idaho Sales.

Q. They were separate books or separate ventures, but you kept the general ledger for all of these?

A. Yes, they were not consolidated in any one spot.

(Testimony of Wilford J. Emasio.)

Q. Could all the books that you kept be reconciled to this return? A. Yes, sir.

Q. Could the books and this return and the bank account that you mentioned be reconciled?

A. Yes, sir.

Q. We noticed in the various earning statements a considerable expenses, will you tell the jury how those expenses were paid?

A. In which operation?

Q. Speaking generally of all of them?

A. Well, can you get down to something definite?

The Court: Now Mr. Witness, just listen to the question and if you can't answer them just say so.

A. I cannot answer unless you make it definite.

Q. Very well, then, we will return to the North Idaho Sales account, can you tell me how the expenses listed there were paid? A. By check.

Q. And you got the figure here from those checks? A. Yes, sir.

Q. And was that the same for the other businesses? A. Yes, sir.

Q. What record, if any, would be made of the funds that Mr. McFee withdrew from his ventures as reflected on the books you kept for the year 1946? A. After he withdrew the money?

Q. No, if he withdrew funds during the year 1946 from a business would there be any record of it? A. Yes.

Q. What would that record be?

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(Testimony of Wilford J. Emasio.)

A. A charge to the personal or partnership account.

Q. Would there be any original record in addition to the drawing account?

A. I don't follow you.

Q. What would be the means by which his employee would get the money out of the business?

A. I don't know.

The Court: Can't you tell us that, would he write a check, would he draw a check?

A. Yes, sir. [38]

The Court: That seems a simple question to answer.

Q. You say he would draw a check.

A. Yes, sir.

Q. And would that check be charged to his drawing account? A. Yes, sir.

Q. And if they were not charged to his drawing account what would happen to your books?

A. They would not balance.

Q. Speaking generally you have told the jury where you obtained the receipt figures of the North Idaho Sales Co., did you ever audit the records of the North Idaho Sales to determine if those receipts were correct?

A. No, we audit them only to reconcile them with the bank statement.

Q. Did you examine any other records than the bank statements? A. No, sir.

Q. Do you know if there were any other records besides the bank statements, of the receipts?

(Testimony of Wilford J. Emasio.)

A. It is my recollection that the collectors deposited the money in the bank and gave it to the girl in the office, that is, a copy of the deposit slip and that is where they became receipts.

Q. Did those collectors which you mentioned make a record of the place where they got this money? A. Not to my knowledge.

Q. Did you ever see any record of where this money came from [39] that went into the bank?

A. No, in some cases yes, but generally, no.

Q. You did see the record which the collection men made?

A. I have seen the receipts or some, turned over to John Jones.

Q. Did you see any record which would tell where Mr. McFee's slot machines were located and how much he got from each location?

A. No, sir.

Q. You never saw such a record?

A. No, not in detail, I saw some.

Q. But you never attempted to reconcile the figures of this return or of these returns against such records? A. No.

Mr. Patten: I think you may cross-examine.

Cross-Examination

Q. (By Mr. Emigh): You were McFee's bookkeeper during this period that you have testified to? A. Yes, sir.

Q. And these reports that you have testified about are prepared from his books, kept in con-

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(Testimony of Wilford J. Emasio.)

nection with his business? A. Yes, sir.

Q. And the deposits were checked with the deposit slips where [40] the collector turned the money in?

A. I think that is correct, they were never turned to me; they were turned to the office and from there on I got the cash book once a month.

Q. And you checked those against the slips, the audit slips of the managers.

A. No, sir, I said that they were furnished to me, they were handed to me to check.

Q. You never checked them?

A. He asked if I saw some of them and I said yes.

Q. That was the collectors slips?

A. Yes.

Q. The items of income which are reflected in the 1946 report, do you have that report there?

A. Yes, sir.

Q. The deduction of the mining lease was a substantial amount? A. Yes, sir.

Q. That amounted to something like $39,000.00?

A. It looks more like it is $59,000.00.

Q. Mr. McFee gave you access to those records for the purpose of preparing these reports; in fact you had access to them all of the time except possibly the bank accounts?

A. I think I made the statement that the books were furnished to me at his office and the cash receipts were distributed out and furnished to me once a month.

(Testimony of Wilford J. Emasio.)

Q. Those various things were carried in a general ledger? [41]

A. Yes, sir, posted in a general ledger.

Q. Periodical entries from daily receipts?

A. Monthly receipts were furnished out of his office and put in a cash book and furnished to me once a month.

Q. You made those entries in a general ledger once a month? A. Yes, sir.

Q. From the daily account kept in the office?

A. Yes, sir.

Q. You had access to them whenever necessary to keep the general ledger?

A. No, I worked from the monthly figures given to me once a month.

Q. And that was the cash book?

A. That was prepared for me once a month.

Q. From records furnished to you once a month? A. Yes, sir.

Q. And that was the method of keeping those accounts? A. Yes, sir.

Q. After checking those with the company's bank accounts they all reconciled?

A. They reconciled their own bank accounts out of their own office.

Q. Still it was reflected in the general ledger?

A. Yes, sir.

Q. And reconciled? A. Yes, sir. [42]

Mr. Emigh: That is all.

(Testimony of Wilford J. Emasio.)

Re-Direct Examination

Q. (By Mr. Patten): Would you look at that figure, I made a mistake in my opening statement, on page 3 item 5, net income, will you give that to me? A. $39,179.01.

Mr. Patten: Thank you, that is all.

GEORGE W. ZELLER

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you tell the jury your address? A. Wallace, Idaho.

Q. Will you give it a little more specifically?

A. 221 Cedar Street.

Q. And your business?

A. Vice-President of the First National Bank.

Q. How long have you held that position?

A. Possibly for five or six years. [43]

Q. How long have you been associated with the First National Bank? A. 31 years.

Q. Do you know the defendant in this proceeding, Mr. A. F. McFee? A. Yes, sir.

Q. We have asked you to bring certain documents with you, would you hand those to the Bailiff please? A. Yes, sir.

Mr. Patten: I am having these marked as Exhibit No. 13.

The Court: Very well.

Q. Can you identify that exhibit?

(Testimony of George W. Zeller.)

A. Yes, sir.

Q. Will you tell the jury what it is?

A. It is a bank statement dating from January 1, 1945 to December 31, 1946 inclusive.

Q. Did you mention whose account it was?

A. A. F. McFee's.

Q. As a banker will you tell us what the bank ledger shows?

A. Deposits on each day they are made and also the withdrawals.

Q. And the balance?

A. Yes, it shows the balance.

Q. Is that the same Mr. McFee who is the defendant in this case? A. Yes, sir.

Mr. Patten: I offer Exhibit No. 13 in evidence.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Q. Did Mr. McFee borrow any funds from your bank in 1945 or 1946? A. He did not.

Mr. Patten: You may cross-examine.

Mr. Emigh: We have no cross-examination.

O. L. JONES

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Where do you reside Mr. Jones? A. 128 King St., Wallace, Idaho.

Q. What is your business? A. Banking.

Q. What bank are you associated with?

A. The Idaho First National Bank of Wallace.

(Testimony of O. L. Jones.)

Q. How long have you been connected with that bank? A. Since 1937.

Q. What is your position with that bank?

A. Manager.

Q Do you know the defendant in this proceeding, Mr. A. F. McFee? [45] A. I do.

Q. How long have you known him?

A. For 25 years.

Q. What transactions has your bank had with Mr. McFee during the years 1945 and 1946?

A. As a depositor and also as a borrower.

Q. Did he have any other transactions with your bank? A. I think not.

Q. Did he purchase any cashiers checks?

A. He might have.

Q. We have asked you to bring certain records of the bank with you, would you hand those to the Bailiff, please? A. Yes, sir.

The Court: At this time I think we will recess for 15 minutes—ladies and gentlemen of the jury you will of course remember at every recess the admonition that I have given you.

3:05 p.m., April 23, 1952

Mr. Patten: I ask that this be marked as Plaintiff's Exhibit No. 14.

Q. Mr. Jones will you tell the jury what the Plaintiff's Exhibit No. 14 is?

A. Exhibit No. 14 shows the savings account of A. F. McFee, [46] care of North Idaho Sales, do you wish the balance on that?

(Testimony of O. L. Jones.)

Q. What does the ledger show?

A. This shows the deposits, withdrawals from July 17, 1945 until April 1, 1952.

Q. Is that the account of the defendant in this proceeding? A. It is.

Mr. Patten: We offer Exhibit No. 14 in evidence at this time.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Mr. Patten: I ask that these be marked as Exhibit No. 15.

Q. Mr. Jones would you identify the documents that have been handed to you?

A. This is a series of ledger sheets starting with No. A103, A. F. or Dorothy McFee by Helen Knoerr, North Idaho Sales Co. beginning on December 23, 1944 to December 28, 1946. This last one is in the name of A. F. or Dorothy McFee.

Q. Is that the account of the defendant in this proceeding? A. It is.

Mr. Patten: We offer Plaintiff's Exhibit 15 in evidence.

Q. Could you tell us who Dorothy McFee is?

A. She is the daughter of A. F. McFee.

Q. You know her personally do you?

A. Yes, sir. [47]

Q. You know her to be the daughter of the defendant, A. F. McFee? A. Yes, sir, I do.

Q. She is the person mentioned on the account with A. F. McFee? A. Yes, sir.

(Testimony of O. L. Jones.)

Mr. Patten: Now, we make the offer, your Honor.

The Court: Is there any objection to that?

Mr. Purdy: No objection.

The Court: It may be admitted.

Q. Referring to Exhibit No. 15, that is a checking account? A. Yes, sir.

Mr. Patten: We ask that these two documents be marked as Exhibit No. 16.

Q. Would you identify documents which have just been handed to you?

A. Yes they are two liability cards in the name of A. F. McFee, they are numbered 4A and 5A.

Q. What period do they cover?

A. They cover from December 15, 1944 until February 14, 1947.

Q. What is shown on this record?

A. It shows the borrowing and the payments, or debits and credits to the liability card of Mr. McFee.

Q. That is a loan card? A. Yes, sir.

Q. Is that the loan card of Mr. A. F. McFee?

A. Yes, sir, it is. [48]

Mr. Patten: We offer this exhibit in evidence.

Mr. Purdy: No objection.

The Court: It may be admitted.

Q. Mr. Jones, can you tell us by reference to that card how much was loaned to Mr. McFee in 1945?

A. No, I cannot; several of these items are renewals of the original amount borrowed but I can

(Testimony of O. L. Jones.)

tell the amounts and the credits as of that date.

Q. Can you read them to us?

A. Yes, in 1945, June 15, $7,000.00 and a $7,000.00 credit which made the balance remain the same.

Q. I am not an accountant Mr. Jones, would you identify those as loans or payments?

A. No, I cannot do that, but I can tell you this, a loan had been made and it was not paid on the due date so the note was renewed and the balance remained the same; no addition to the debit or the credit.

Q. Very well, will you proceed?

A. On 6-8-1946—no—that is June 18, 1945 a $10,000.00 note was granted.

Q. That was a $10,000.00 loan?

A. Yes, in addition to the balance as shown on August 9, 1945 an additional $10,000.00 and also on that date another $10,000.00 was granted and a $7,000.00 note was also granted but it was a renewal so the balance stayed the same; on September 4, 1945 $2,000.00 was paid reducing [49] the balance by that amount and on October 16, 1945 there was an additional loan of $7,500.00 granted and on October 31, 1945 there was a payment of $389.13 and that is the end of 1945, now do you want me to go with 1946?

Q. Will you give us the total in 1945, how much was loaned and how much was paid on those loans?

A. On March 21, 1945 there was a balance of

(Testimony of O. L. Jones.)

$21,500.00 and on October 31, 1945 there was a total of $51,110.87.

Q. I checked it over and as I have it, and you can tell me, were the loans $37,500.00 with payments of $2,389.13?

A. That is very close, yes.

Q. There were three $10,000.00 loans?

A. Yes, and a $7,500.00 loan.

Q. And payments of $2,000.00 and one other payment of $389.13? A. Yes, sir.

Q. Now then, will you continue with the year 1946, give us the same information from the exhibit?

A. Yes sir, on January 15, 1946 there was a renewal of $7,500.00 and a payment of $7,500.00, on January 29, 1946 there was another renewal of $7,000.00 and on February 1, 1946 there was a payment of $19,610.87 and a renewal of that amount so the balance was the same; on June 5, 1946 there was a $7,000.00 note and a $7,000.00 payment, another renewal; on June 24, 1946 there was a payment of $10,000.00 and a new note of $10,000.00, another renewal; on June 24, 1946 there was an increase of $20,000.00; on July 11, 1946 [50] there was a payment of $229.50 and another renewal on July 27, 1946 of $7,500.00 leaving the balance the same, on July 31, there was a renewal of $7,000.00 and that left the balance the same, on August 6, 1946 there was a payment of $100.00, on August 7, 1946 there was another renewal of $19,610.87, the balance remaining the same. On August 14, 1946 there

(Testimony of O. L. Jones.)

was a payment of $114.00 and on August 19, a payment of $579.00 and $315.50, on September 7, 1946 there was a payment of $75.00 and on September 12, 1946 a payment of $100.00 and on September 14, a payment of $113.50 on October 11, 1946 a pay ment of $113.00, on October 15, a payment of $74.75, on November 15, a payment of—that was November 7, if I said November 15, that payment was $112.50 on November 29, a payment of $74.50 and on November 30, a payment of $3,450.18 and on December 14, a payment of $112.00 and on December 27, a renewal of $10,000.00 and on December 31, a payment of $74.25. That completes the year 1946.

Q. Mr. Jones, am I correct in summarizing, does it show $20,000.00 of new loans?

A. That is approximately so.

Q. And the payments on those loans, did you total those? A. No, I didn't.

Q. Would this help you (handing witness document)? A. Yes it would.

Q. Now, what total payments were made on those loans? [51] A. $5,637.68.

Q. Now, let's return to the year 1945, is it possible that you didn't get all the payments on the loans for that year?

A. Well, starting in January, January 2, 1945 I show payments for the year of $100.00; $500.00, $1,400.00; $100.00; $1,500.00; $100.00; $500.00; $500.00; $1,00.00; $2,500.00; $1,000.00; $1,000.00 and $389.13.

Q. On the amount that you previously stated that this record showed I believe you failed to turn

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(Testimony of O. L. Jones.)

this card over? A. Yes, I guess that is right.

Q. Now would this assist you in telling how much Mr. McFee repaid on those loans in 1945?

A. Yes it would.

Q. Only in 1945? A. Yes.

Q. ——In your previous answer you did not check the other side?

A. That is right, in 1945 I have here $1,400.00; $1,500.00; $1,000.00; $500.00; $1,000.00; $2,500.00; $1,000.00 and $389.13.

Q. And that is a total of what?

A. $9,289.13.

Q. I think Mr. Jones, that total includes a couple of payments in 1944?

A. Yes, that is right, that would be $6,789.13.

Q. And that was the amount Mr. McFee paid on the loans at [52] your bank? A. Yes.

Q. Do you know how he paid those?

A. No, sir, I don't.

Mr. Patten: I ask that this be marked.

Q. The exhibit shows the same information for the year 1946? A. Yes, sir.

Mr. Patten: I ask that this exhibit be marked as Plaintiff's Exhibit No. 17.

Q. Mr. Jones would you tell the court and jury what Plaintiff's Exhibit No. 17 is, each one of the documents, there are two?

A. Yes, I have a cashier's check drawn on the Idaho First National Bank No. 124697 in the amount of $12,500.00 in favor of E. M. Stern, it is dated January 28, 1946.

(Testimony of O. L. Jones.)

Q. Will you read the endorsement on that?

A. Yes, I imagine it is E. M. Stern and it has been guaranteed by a bank endorsement where it was cashed.

Q. What bank did that clear through and where?

A. It looks like the Federal Reserve of Minneapolis and the Federal Reserve of Portland from there it went to,—I imagine it was first deposited with the Dakota National Bank at Fargo, North Dakota, then to the First National of Minneapolis and from there to Portland and then to us.

Q. Where would you say that check was first negotiated or deposited? [53]

A. From the date,—I

Q. I am asking that you give that information from your experience as a banker.

A. From the date that it bears it would be at the Dakota National Bank, Fargo, North Dakota.

Q. Now, then, the second document, will you identify that?

A. Yes, it is a cashier's check on the Idaho First National Bank No. 124701, it is dated February 1, 1946, also to E. M. Stern and in the amount of $3,000.00.

Q. And will you give the endorsement on that?

A. The same endorsement, I think it has the same endorsement but it is rather blurred, I can see the Dakota National Bank of Fargo,—Yes, I think that is correct.

Q. Who purchased those checks at your bank?

A. I will have to see these register sheets.

(Testimony of O. L. Jones.)

Q. Very well.

A. No. 124697 made payable to E. M. Stern was purchased by F. C. Keane.

Q. And what was the amount of that?

A. $12,500.00.

Q. And by whom did you say it was purchased?

A. F. C. Keane.

Q. Do you know Mr. Keane? A. Yes, sir.

Q. What Mr. Keane is that?

A. He is an attorney at Wallace, Idaho. [54]

Q. What is his full name?

A. Well, I cannot give his first name, but his second name is Clayton, Clayton Keane.

Q. And the next check, who purchased that, the check in the amount of $3,000.00?

A. This was made payable to E. M. Stern and was purchased by Mr. F. C. Keane.

Mr. Patten: I shall not offer this in evidence at this time.

The Court: Very well.

Q. You have handed exhibit marked Plaintiff's Exhibit No. 18, two documents, can you identify those?

A. Yes, they are cashier's checks No. 124957, it is drawn on the Idaho First National Bank of Wallace, Idaho, it is payable to Walter T. Murphy, in the amount of $3,000.00; the second document is a cashier's check No. 125175, it is dated July 10, 1946, payable to A. F. McFee or the Idaho First National Bank in the amount of $6,000.00, it is drawn on the Idaho First National Bank of Wal-

(Testimony of O. L. Jones.)

lace, the first check was dated May 3, 1946.

Q. Who purchased those two checks?

A. The $3,000.00 check, No. 124957 dated May 3, 1946, was made payable to W. T. Murphy and purchased by A. F. McFee.

Q. Will you consult your records and tell us who purchased the $6,000.00 check?

A. The $6,000.00 check No. 125175, dated July 30, 1946, was [55] purchased by A. F. McFee.

Q. Is the A. F. McFee listed in your records the defendant in this case?

A. I believe him to be, yes.

Mr. Patten: I offer this in evidence at this time.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Mr. Patten: I will ask that this be marked as Exhibit No. 19.

Q. Mr. Jones, you have in your hand Plaintiff's Exhibit No. 19, will you tell the jury what it is?

A. It is our cashier's check No. 125406 it is dated November 2, 1946, made payable to A. F. McFee or Ourselves collateral receipt 120484 in the amount of $5,000.00.

Q. Can you tell us who purchased that check?

A. No, I cannot.

Q. What does your record show?

A. Collateral record 120484.

Q. That is all it shows? A. Yes.

Q. Do you know what the collateral record is?

A. I think I do but I don't want to go under oath on that, we looked it up.

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(Testimony of O. L. Jones.)

Q. This matter? A. Yes, I have.

Q. And what is your best recollection on that? [56]

A. May I see that duplicate, I think I have it marked on there.

Yes, I do, this was to secure a loan of Roger W. Greenough.

Q. So the cashier's check was deposited as collateral for a loan to Mr. Greenough? A. Yes.

Q. Did Mr. Greenough purchase this one?

A. I don't know.

Mr. Patten: We won't offer that in evidence at this time, and I will ask that this instrument be marked as Plaintiff's Exhibit No. 20.

Q. You have been handed Plaintiff's Exhibit No. 20, can you identify that for the jury?

A. These are various ledger sheets covering the checking account of the Dan MacLease, the first entry shows February 1, 1945, and the last entry shows February 28, 1947.

Mr. Patten: We won't move that admission at this time.

Q. Do you know anything, personally, about this account? A. No, I don't.

Mr. Patten: I will not offer this in evidence at this time but I will ask that this instrument be marked as Plaintiff's Exhibit No. 21.

Q. Will you tell the jury what those documents are?

A. Yes, they are a series of deposit slips on the Dan MacLease account. The first one being dated

(Testimony of O. L. Jones.)

February 1, 1945, and the last one having no date, but the next to the last one is December 21, 1946. [57]

Q. Do those deposit slips show deposits to the account that was previously handed to you?

A. That is correct.

Q. What is the function of a deposit slip?

A. To convey money or credits to the account, in whatever amount it might be. It could be to a personal account company or lease and this was the Dan MacLease.

Q. Does it describe what the deposit consists of?

A. Not always, sometimes out of town items, sometimes it shows the cash and sometimes the checks.

Q. What does the first deposit slip show?

A. That would show it by A.F.M., I imagine A. F. McFee on it and showing a number there which I take it to be his check number, 10927, usually that is the way the deposit comes in or with the bank numbers.

Q. Now will you turn to the second one and tell us what it shows?

A. It would indicate that it was a check but it is not marked as to what it is.

Q. The amount of the first deposit was what?

A. $1,000.00.

Q. Now then will you turn to the third?

A. Yes, it shows currency in the amount of $2,000.00, the next is currency also in the same amount and the next is currency.

(Testimony of O. L. Jones.)

Q. Will you read the amount?

Mr. Emigh: We will object to this until it has been [58] offered in evidence, now he is telling what is stated on the exhibit without having it offered.

The Court: Yes, I think it better be offered in evidence.

Mr. Patten: I will withdraw the last question and I will come to that later.

Mr. Purdy: Then we will ask your Honor, that the testimony be stricken and the jury instructed to disregard the same.

The Court: The motion is denied.

Mr. Patten: I will ask that this be marked as Plaintiff's Exhibit No. 22.

Q. Mr. Jones, can you identify that, the instrument marked as Plaintiff's Exhibit No. 22?

A. That is a deposit ticket in the name of J. A. Allen, dated 12-31-46.

Mr. Patten: The Government will not offer that in evidence at this time. You may cross examine the witness.

Cross Examination

Q. (By Mr. Purdy): Mr. Jones, will you state whether or not Mr. McFee had collateral with your bank for the security or the repayment of this loan?

A. He had collateral, yes. [59]

Mr. Purdy: I believe that is all.

(Testimony of O. L. Jones.)

Redirect Examination

Q. (By Mr. Patten): What type of collateral did he have?

A. Stocks, bonds and real estate.

Q. Anything else?

A. Yes, there was also cashier's check left there but not used as collateral.

Q. Do you recall how many cashier's checks he had there as collateral? A. No.

Q. Was it a substantial amount?

A. I would not be prepared to say.

Mr. Patten: That is all, thank you, Mr. Jones.

Mr. Purdy: Nothing further.

B. E. ALLISON

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Patten): Where do you live, Mr. Allison? [60]

A. 901 Montana Ave., Coeur D'Alene.

Q. What is your business? A. Banking.

Q. With what bank are you associated?

A. The Idaho First National.

Q. And what is your position with that bank?

A. Manager.

Q. We asked you to bring certain records of the bank with you, could you hand them to the Bailiff, please? A. Yes, sir.

Q. Are you acquainted with the defendant in this proceeding? A. Yes sir.

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(Testimony of B. E. Allison.)

Mr. Patten: I ask that these documents be marked as Plaintiff's Exhibit No. 23.

Q. You have been handed some documents making up Exhibit No. 23, will you identify them for the jury?

A. This is the ledger record of the North Idaho Sales Co. from September 13, 1944, to July 23, 1947.

Q. Is that the business account of Mr. McFee?

A. This is the North Idaho Sales Co.

Q. You know Mr. McFee to be the operator of that?

A. I understood that he was interested in it.

Mr. Purdy: We object to that and ask that it be stricken.

The Court: Denied.

Mr. Patten: I would like to offer that in evidence [61] on the basis that the account has been identified.

The Court: I will grant that, the exhibit will be admitted. I don't think there is any question about it.

Q. Mr. Allison, you have brought a transcript of this account? A. Yes, sir.

Mr. Patten: I wonder if it would be permissible to substitute it at this time.

Mr. Purdy: I think if he identifies it we will not object.

The Court: Is it agreeable to substitute this in lieu of the exhibit?

Mr. Purdy: Yes, we will agree to that.

(Testimony of B. E. Allison.)

Mr. Patten: I might call attention to the fact that the transcript covers the years 1945 and 1946; the original starts with some items in 1944 and ends in 1947, that is the only difference.

The Court: Is that agreeable?

Mr. Purdy: Yes, we do not object to that.

Q. These are records of your bank?

A. Yes, sir.

Mr. Patten: I ask that these be marked as Plaintiff's Exhibit No. 24.

Q. The first document handed to you, what is that?

A. The ledger account for the Foresters Club from December 26, 1944, to October 18, 1945.

Q. That is an official record of the bank? [62]

A. Yes, sir.

Q. The Foresters Club in Coeur d'Alene?

A. Yes, sir.

Q. The other instrument that you have is a transcript of the account? A. Yes, sir.

Q. Is that a correct transcript?

A. It is a correct transcript from January 1, 1945, to October 18, 1945, the ledger sheet covers a larger period.

Mr. Patten: I offer Plaintiff's Exhibit No. 24 in evidence as the account of the Foresters Club being identified by the accountant heretofore called as being operated by Mr. McFee and having an account in this bank.

Mr. Purdy: No objection.

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(Testimony of B. E. Allison.)

The Court: Do you have any objection to the copy being substituted?

Mr. Purdy: No objection.

The Court: It may be admitted and the copy may be substituted.

Mr. Patten: I ask that this be marked as Exhibit No. 25.

Q. Mr. Allison, the small sheet, can you identify that for the jury?

A. That is a ledger account of our bank of the Big Barn and Gem Club from March 2, 1944, to January 6, 1946; that is Exhibit No. 25. [63]

Q. And is the second document you have there a correct transcript of that?

A. It is a correct copy from December 31, 1944, to January 6, 1946, the ledger covers a larger period of time.

Mr. Patten: I offer Plaintiff's Exhibit No. 25 in evidence and ask permission to substitute the copy.

Mr. Purdy: May I ask a question on this?

The Court: Yes, you may.

Q. (By Mr. Purdy): Mr. Allison, who opened that account, do you know?

A. The account, No. 1, the ledger sheet authorizes the signature of A. F. McFee and W. D. Jacks, we usually have them sign on the ledger sheet.

Q. (By Mr. Purdy): That was a joint account?

A. That either signature could be recognized, yes, sir.

Mr. Purdy: That is all I care to ask.

(Testimony of B. E. Allison.)

Mr. Emigh: We object to this as not being binding on the defendant; a proper foundation is not laid to establish this account.

The Court: If it is not connected up so far as the other party is concerned it will be stricken.

Mr. Patten: I ask that this be marked as Exhibit No. 26.

Q. Mr. Allison, will you identify Plaintiff's Exhibit No. 26?

A. That is what is known in the bank as an inter-branch transaction, a credit slip indicating a transaction between two [64] of our branches. A transfer from Coeur d'Alene to Lewiston for the account of the Foresters Club, Lewiston, Idaho, in the amount of $3,000.00 dated December 23.

Q. What year? A. 1946.

Q. Is that a part of the official records of your bank? A. Yes, sir.

Mr. Patten: I ask that Exhibit No. 26 be admitted in evidence.

Mr. Purdy: May I ask a question?

The Court: Yes.

Q. By Mr. Purdy): Is there any way that you can tell who requested the transfer of that money?

A. No, there isn't.

Mr. Purdy: We object to it unless it is connected with this defendant.

The Court: Overruled, it may be admitted. At this time we will recess until 10:00 o'clock tomorrow morning.

(Testimony of B. E. Allison.)

April 24, 1952, 10:00 o'clock a.m.

Q. Mr. Allison, for the benefit of the Court and jury will you identify Exhibit No. 26?

A. That is a correct copy of the inter-branch transaction that passed between the Lewiston branch and our own bank on [65] December 23, 1946, indicating a transfer of $3,000.00 for the credit of the Foresters Club of Lewiston.

Q. As I understand it the Coeur d'Alene office received $3,000.00 which was credited to the account of the Foresters Club at Lewiston?

A. That is correct.

Q. From that slip can you tell the nature of the funds that your bank received?

A. We have a system in the bank or had at that time of marking cash receipts with a red pencil to the left of the amount and this is so marked, indicating that it was cash.

Q. You mean by cash, checks or currency?

A. I didn't handle the transaction personally, it was handled in the teller's cage and they count the cash separate from other transactions.

Mr. Patten: I offer this in evidence at this time.

Mr. Purdy: The same objection as we interposed to the appearance of Mr. W. D. Jacks' signature part of Exhibit No. 25.

Q. Does that copy have a signature on it?

A. No, it does not.

The Court: It may be admitted.

Mr. Patten: I would like to withdraw this witness at this time and call another.

The Court: Very well, you may do so. [66]

LEO W. JESSIE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): What is your address, Mr. Jessie?

A. 1132 8th St., Clarkston, Washington.

Q. And what is your business?

A. Vice-President and manager of the First Security Bank at Lewiston.

Q. How long have you held that position?

A. 30 years in that bank.

Q. We asked for some official records of the bank, do you have them? A. Yes, sir.

Mr. Patten: May this be marked as Plaintiff's Exhibit No. 27.

Q. Now, Mr. Jessie, can you identify Exhibit No. 27?

A. These are the original ledger sheets covering the checking account in our bank of the North Idaho Sales, covering the period of May 31, 1944, to December 8, 1947.

Q. Are these official records of your bank?

A. Yes, sir.

Mr. Patten: We would like to offer Exhibit No. 27 in [67] evidence.

Mr. Purdy: No objection.

The Court: It may be admitted.

Mr. Patten: I think you may cross examine.

Mr. Purdy: No cross examination.

R. A. WOOD

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Mr. Wood, what is your address and business?

A. 1104 12th St., Clarkston, Washington. I am Assistant Manager of the Idaho First National Bank at Lewiston, Idaho.

Q. How long have you been in that bank?

A. Since August 1, 1940.

Q. Do you have in your custody the original records of the bank which we requested Mr. O'Neil to bring?

A. Yes, I came up for him, I have those original records.

Mr. Patten: I ask that these be marked as Plaintiff's Exhibit No. 28.

Q. Could you identify Plaintiff's Exhibit No. 28 for the jury?

A. The original ledger sheets of the Idaho First National Bank of the checking account of the Foresters Club covering the period of December 28, 1944, to June 4, 1947, inclusive. [68]

Q. They are original records of the bank?

A. Yes, sir.

Mr. Patten: I offer these in evidence,—Let me ask one question.

Q. The North Idaho Sales, did they have an account with your bank during that period?

A. Not in the period specified.

(Testimony of R. A. Wood.)

Mr. Purdy: We have no objection to the exhibit.

The Court: It may be admitted.

Q. Does your bank have an account in the name of A. F. McFee? A. Not a personal account.

Q. Has your bank loaned any money to Mr. McFee during the years 1944 to 1947?

A. None, to my knowledge, ever.

Q. I think I requested another record from your bank?

A. I cannot produce that, it was destroyed in the head office, destruction of records after five years.

Q. Could you look at Plaintiff's Exhibit No. 26 and your Exhibit No. 28 and tell us if the funds for that transfer was credited to the account of the Foresters Club?

A. Plaintiff's Exhibit No. 26 is an inter-branch clearing transaction wherein the Coeur d'Alene branch of the Idaho First National Bank transferred to the Lewiston Branch of the Idaho First National for credit to the account of the Foresters Club, the date of the inter-branch clearing slip is December 23, 1946,—this $3,000.00 item was credited to [69] the account of the Foresters Club on December 28, 1946.

Mr. Patten: You may cross examine.

Mr. Purdy: No questions.

C. E. ALLISON

Recalled as a witness for the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Mr. Allison, will you refer to the original of Exhibit No. 25?

A. Yes, I have it.

Q. When was Mr. Jacks authorized to draw on that account?

A. It was opened March 2, 1944; that would be the time it was authorized; I have a memorandum here, March 2, 1944.

Q. Who was the other authorized signature?

A. Mr. McFee.

Q. How long thereafter was Mr. Jacks authorized to sign checks on that account?

A. Apparently the authorization of Mr. Jacks ceased on July 17, 1944.

Q. During the years 1945 and 1946 did Mr. Jacks have authorization in connection with that account?

A. Not according to my record. [70]

Mr. Patten: We introduced that evidence to overcome the objection to this exhibit by counsel. You may cross examine.

Mr. Purdy: No cross examination.

Mr. Patten: I would like to make an offer in explanation of proof outside of the hearing of the jury.

The Court: Very well, I will excuse the jury

at this time and you will be called by the Bailiff.

(In the absence of the jury.)

Mr. Patten: I will have this marked as Exhibit No. 29. Your Honor, we are introducing this solely for showing the expenditures of certain funds, the record of the Clerk of the United States District Court will show that Mr. McFee was convicted of a previous offense and,——

Mr. Emigh: The defendant will object to the use of Exhibit No. 29 for the reasons, first, that no proper foundation has been laid, and, second, as indicated from evidence preceding this, the testimony which will be necessary to connect this whole transaction would be that of attorneys at that time acting for the defendant in this case and in that connection would involve oral instructions given to that attorney or those attorneys which are privileged communications. The entire testimony of that attorney would be privileged as based on communications between the attorney and the defendant and this particular evidence is highly prejudicial in character if admissible at all, the order of proof should be such that the [71] foundation is laid before any such prejudicial evidence is even offered.

Mr. Patten: I propose to show payments shown on there; I do not propose to call any attorney,——

The Court: I am satisfied that this is admissible for the purpose of showing payments of money, however, the question that the Court has in mind is whether other matters in the exhibit would be prejudicial to the defendant to the extent that it should not be admitted. The fact that it shows

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that he was convicted of this offense, of course, also shows that he paid fines. As far as the payment of money is concerned that, I am satisfied, would be admissible.

Mr. Emigh: May I ask if the testimony would not of necessity, in order to connect it up, depend upon instructions given by the defendant to his attorneys which, of course, would be privileged.

The Court: The only question I have now for consideration is the question of whether this instrument contains other information that would be highly prejudicial.

Mr. Patten: I would be willing to stipulate that these amounts were paid.

The Court: If counsel will stipulate to that then it will do away with the necessity of putting in the exhibit. I am inclined to admit it but I think I should give counsel an opportunity to stipulate if they care to do so.

Mr. Emigh: This is offered to prove the corpus delicti, [72] then, we could not stipulate.

The Court: Just so that counsel will have plenty of opportunity to study the matter I will say that it is my present intention to admit this, however, I want you to have an opportunity to go over this matter. If you gentlemen agree on a stipulation then of course it will not be necessary to consider the admission of the exhibit.

Mr. Emigh: We were about to agree and I think possibly without guaranteeing to the Court that we can do so, I think we can work out something that will be satisfactory to the Government.

The Court: It seems to be a very simple matter I will take a recess for five minutes at this time and you may then have your stipulation ready if you care to stipulate.

(The following proceedings were had after the recess in the absence of the jury.)

Mr. Patten: Counsel for the defendant and for the Government have agreed that we will withdraw Exhibit No. 29 previously offered by the Government and in lieu thereof we will substitute a stipulation which I would like to put in the record.

Mr. Emigh: I think that goes beyond the bill of particulars. We have a motion that should be acted upon.

The Court: If it was given to you before the trial of course the motion to amend would be granted. I will call the jury and you may read your stipulation into the record. [73]

(The following in the presence of the jury.)

Mr. Patten: It is hereby stipulated between counsel for the plaintiff, United States of America, and counsel for the defendant, A. F. McFee, that the cash book of the District Court of the District of North Dakota shows that on March 25, 1946, the following payments were made and credited to the account of the individuals: A. F. McFee, $25,000.00; Robert F. McDonald, $4,000.00; Fred Schwenk, $2,500.00.

The Court: Ladies and gentlemen of the jury, you will take this stipulation just as if a witness

was on the stand testifying that this money was paid as stipulated. You may call your next witness.

FRED SCHWENK, JR.

Called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Rossi): Your name is Fred Schwenk? A. Yes, sir.

Q. Where do you reside?

A. 1912 West Gardner, Spokane, Washington.

Q. Do you recall borrowing money from Mr. McFee about March 25, 1946? [74]

A. There was a fine paid of $2,500.00 for me, yes sir.

Q. Did you borrow he money from Mr. McFee?

A. Yes, sir.

Mr. Purdy: I move to strike the answer to that previous question as not being responsive.

The Court: Yes, that is right, is may be stricken. That is the answer to the former question concerning a fine being paid.

Q. Now, you state that you borrowed $2,500.00 about March 25, 1946 from Mr. McFee, is that the McFee that is the defendant in this case?

A. Yes, sir.

Q. What evidence of this obligation did you give to Mr. McFee?

A. My recollection is that I gave him a note.

Q. For $2,500.00? A. Yes, sir.

Q. You have heard the stipulation that was made just prior to your taking the stand?

(Testimony of Fred Schwenk, Jr.)

A. Yes, sir.

Q. I will ask you if that $2,500.00 which was paid to the District Court of the United States for the District of North Dakota was the $2,500.00 that you borrowed from Mr. McFee?

A. Yes, sir.

Q. Now, in connection to the matter pertaining to the District Court of the United States for the District of North Dakota [75] did Mr. McFee loan you any other money? A. No, he did not.

Q. As a matter of fact did Mr. McFee pay the sum of $1,000.00 to Mr. Stern for your benefit?

Mr. Purdy: That is objected to as improper, it is leading and suggestive and it is an attempt to impeach his own witness.

The Court: It is somewhat leading but I will let him answer.

A. I am not aware of it, I cannot remember it if he did.

Q. Can you refresh your memory from that (handing witness a document)?

A. This statement says that but as I recall it I cannot be positive.

Q. What is your recollection?

A. That there was $2,500.00 paid for me that is all I can remember.

Mr. Emigh: We move that the answer be stricken and the jury instructed to disregard it entirely.

The Court: His answer may stand.

Q. You cannot further refresh your recollec-

(Testimony of Fred Schwenk, Jr.)

tion? A. No, sir, I cannot.

Q. Have you ever paid this back to Mr. MeeFe?

A. No, sir, I haven't.

Q. What was your relationship with Mr. McFee at that time?

Mr. Emigh: We object to that as being incompetent, [76] irrelevant and immaterial and not an issue in this case as to the relationship and these other matters, it is leading to highly prejudicial matters that have been guarded against.

Mr. Rossi: I will withdraw the question.

Q. At the time that you borrowed that money from Mr. McFee did you have any conversation with him concerning this matter? A. Yes, sir.

Mr. Emigh: I think I will object to that.

The Court: He has answered, the answer as to whether he had a conversation may stand.

Mr. Emigh: May I ask that they be required to make an offer of proof so that we can protect our client in this matter.

Mr. Rossi: One of the elements required is the elecent of intent to defraud the United States.

The Court: I will excuse the jury and take your offer.

(In the absence of the jury.)

The Court: Now, just what do you expect to show?

Mr. Rossi: We expect to show by this witness that this was a fine paid by Mr. McFee in the case in the United States District Court of North Dakota. The fine was paid by Mr. McFee for this

(Testimony of Fred Schwenk, Jr.)

man and there was no intention that the money would be repaid and that it has not been repaid as the witness has already testified.

The Court: You may go this far. The witness will be permitted to testify that it was a fine and that he has [77] this information and that at the time this money was paid that it was understood that it wasn't to be repaid. You may show that.

Mr. Emigh: We wish to object to the offer of proof. It is an attempt to impeach a written instrument.

(The following in the presence of the jury.)

The Court: He may answer. The witness may answer with the limitation on the question.

Q. I asked if you had any conversation with Mr. McFee regarding this amount of $2,500.00 prior to the time it was borrowed from Mr. McFee?

A. Yes, sir.

Q. Now you will answer the question in accordance with the ruling of the Court.

A. I had a conversation about this $2,500.00 before it was loaned to me.

Q. Will you tell the Court and jury what that conversation was in connection with, leaving out the portion as the ruling of the Court indicated.

Mr. Emigh: May the record show that the defendant objects to this; the answer sought to be elicited at this time for the reason attempts to impeach their own witness or rather it is an attempt to impeach an written instrument and a conclusion as to the mental status of another person.

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(Testimony of Fred Schwenk, Jr.)

A. That he was to loan this money to me, that it was to be repaid, I gave him a note for it. [78]

Q. Has it been repaid? A. No, sir.

Q Has Mr. McFee ever made a demand for this money?

Mr. Purdy: We object to that as being immaterial, it is incompetent, irrelevant and immaterial and further it is based upon a document not in evidence, which might or might not under the terms be due at this time.

The Court: The Court has ruled, you may go ahead.

A. There has been no demand to pay this note.

Q. What was the face amount of this note?

A. In my hazy recollection it was $2,500.00.

Q. As you previously stated, this was the amount paid into the office of the Clerk of the Court.

A. Yes, sir.

Mr. Rossi: You may cross-examine.

Mr. Purdy: No questions.

R. E. McDONALD

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you give your address please?

A. 51 River St., Wallace, Idaho.

Q. Are you acquainted with the defendant, Austin F. McFee? [79] A. Yes, sir.

Q. You have been associated with him for a

(Testimony of R. E. McDonald.)

number of years? A. Not all of the time.

Q. You have been associated in business with him? A. A little.

Q. Did you hear the stipulation that was previously read in this Court concerning the sum of $4,000.00 for the District Court of North Dakota, that was paid into that Court about March 25, 1946? A. Yes, sir.

Q. In that stipulation it was stated that the sum of $4,000.00 was paid by you, is that correct?

A. Yes, sir.

Q. Mr. McDonald, from what source did that money come?

Mr. Purdy: That is objected to on the same basis that we objected to the testimony of the former witness.

The Court: If it didn't come from Mr. McFee I will sustain the objection.

Mr. Patten: I will withdraw the question.

Q. I will ask you from whom you obtained that money? A. Mr. Keane.

Q. Who is he?

A. An attorney at Walace, Idaho.

Q. Was he acting as your attorney at the time?

A. Yes, sir.

Q. Did you borrow this money from Mr. Keane?

Mr. Emigh: We will object to that as being privileged.

The Court: He may answer.

A. Yes, isr.

The Court: The Court will not confine the Gov-

(Testimony of R. E. McDonald.)

ernment nor the defendant to only one question of a witness, we cannot get all the evidence in with one question.

Q. What was the total amount that you borrowed from Mr. Keane? A. $4,750.00.

Q. Have you repaid that amount to Mr. Keane?

A. No, I haven't.

Q. Do you know who is the holder in due course of that obligation?

A. Only what Mr. Rice informed me.

Q. Do you know of your own knowledge who is the holder of that note? A. No, sir.

Q. Have you ever made any payment on that note? A. No, sir.

Mr. Patten: No further questions.

Mr. Purdy: As I understand it this testimony is going in with the understanding that unless it is connected up it will be stricken.

The Court: Yes, it will have to be traced to Mr. McFee, the defendant here.

Mr. Purdy: We have no cross-examination. [81]

FRANCIS MURPHY

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you give your address to the jury?

A. 11 Broadway, Fargo, North Dakota.

Q. What is your business? A. Lawyer.

(Testimony of Francis Murphy.)

Q. How long have you been a member of the bar?

A. That is not fair—about 50 years, I think.

Q. I understand that you specialized in trial work? A. Yes, sir.

Q. Do you know the defendant in this proceeding?

A. Yes, sir, I have known Mr. McFee.

Q. Do you know Mr. McDonald who was just on the stand? A. Yes, sir.

Q. How did you meet Mr. McDonald?

Mr. Purdy: That is objected to as immaterial.

The Court: He may answer.

A. I was introduced to him by Mr. Stern, who was his lawyer.

Q. Did you represent Mr. McDonald in North Dakota, in a proceeding in the District Court of the United States for the District of North Dakota? [82] A. Yes, sir.

Q. This is rather a delicate question, did you get paid for representing him?

Mr. Purdy: That is objected to as privileged between the defendant and his attorney.

The Court: He may answer.

A. Yes, I did get paid.

Q. How much did you get paid?

Mr. Purdy: May this go in under our objection?

The Court: Yes, with the same ruling.

A. $3,000.00.

Q. How was that paid?

(Testimony of Francis Murphy.)

A. Mr. Stern paid me $1,500.00 at Bismarck while we were there a short time later——

Q. Was that in the Patterson Hotel?

A. Yes, sir.

Q. How was that paid?

A. In currency, cash.

Q. Do you remember the denomination of the currency? A. No, sir.

Q. Were they large bills?

A. I don't recall that at all.

Q. You received the remainder of the fee, did you?

A. Yes, sir, at Fargo a short time afterwards.

Q. Who paid that? A. Mr. Stern. [83]

Q. How was that paid? A. In currency.

Mr. Patten: You may cross-examine.

Mr. Purdy: No questions.

Mr. Patten: I wonder, if the Court please, if this witness may be excused?

The Court: If it is agreeable with counsel for the defendant.

Mr. Purdy: We have no objection.

The Court: Then you may be excused Mr. Murphy.

N. I. ROOPE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): What is your address?

A. 229 Avenue C, West Bismarck, North Dakota.

Q. What is your business? A. Banking.

(Testimony of N. I. Roope.)

Q. What bank are you associated with?

A. The First National Bank of Bismark.

Q. And what is your position with that bank?

A. Vice-president. [84]

Q. How long have you been associated with that bank? A. 25 years.

Q. Where is that with reference to the Patterson Hotel? A. It is just a block west.

Q. We have asked you to bring certain records of the bank here. A. Yes, sir.

Mr. Patten: I wonder if I may use the blackboard here to illustrate?

The Court: Yes, you may do that.

Mr. Patten: I am going to write on the board the stipulation read into the record.

Mr. Emigh: I think that we object to that on the ground that it tends to substitute evidence in this case, this isn't proper evidence, it is not proper for illustrative purposes, it is not a matter to be illustrated, it is not a map or a diagram, it is a matter that is in evidence.

The Court: Is this something that you want the witness to explain.

Mr. Patten: It is for the purpose of explanation.

The Court: You may place such diagram on the board as you desire and if I determine it is improper I will strike it.

(The following was placed on the blackboard; A. F. McFee $10,000.00; Robert McDonald $4,000.00; Fred Schwenk $2,500.00; total $16,500.00.)

Mr. Patten: I will ask that this document be

(Testimony of N. I. Roope.)

marked [85] for identification as Plaintiff's Exhibit No. 30.

Q. Mr. Roope do you recognize this exhibit?

A. Yes, sir.

Mr. Patten: I also ask that this be marked as Exhibit No. 31.

Q. Do you recognize this? A. Yes, sir.

Q. Will you tell the jury what they are?

A. Exhibit No. 30 is a cashier's check No. 10018 dated March 21, 1946 issued to the Clerk of the United States District Court.

Mr. Emigh: I object to this, I don't think it is necessary to read the exhibit.

Q. Is that an official record of your bank?

A. Yes, sir.

Q. Is Exhibit No. 31 an official record of your bank? A. Yes, sir.

Mr. Patten: I would like to offer them in evidence at this time.

Mr. Emigh: May we ask a question?

The Court: You may.

Q. (By Mr. Emigh): Calling your attention to Exhibit No. 30 I will ask you if this is a memorandum that someone placed there after these checks were made (indicating) and are I refer to the memorandum in the upper left hand corner of Exhibit No. 30, is it also true of Exhibit No. 31?

A. Yes, sir.

Mr. Emigh: We will object to these exhibits.

The Court: You can erase that and the exhibit

(Testimony of N. I. Roope.)

will be admitted. They don't amount to anything, the notations.

Q. Would you further identify Exhibit No. 30?

A. That is a cashier's check No. 10018 dated March 21, 1946 issued to the Clerk of the United States District Court for $2,500.00.

Q. And the endorsement on the back?

A. It is endorsed by the Clerk of the United States District Court Beatrice A. McMichael, Clerk.

Mr. Patten: May I have permission to hand that to the jury?

The Court: Yes.

Q. Now will you continue to further identify Exhibit No. 31?

A. That is a cashier's check on the First National Bank of Bismarck, North Dakota, No. 10017 dated March 21, 1946, issued to the Clerk of the United States District Court for $11,500.00, it is endorsed by the Clerk of the United States District Court, Beatrice A. McMichael, Clerk.

Q. I have correctly entered the amounts of these checks on the board have I? A. Yes, sir.

Q. Do you recall who purchased those checks from you? A. Yes, sir. [87]

Q. Who was that?

A. E. M. Stern of Fargo, North Dakota.

Q. Is he in the Court room?

A. Yes sir, right there (indicating).

Mr. Patten: May the record show that the witness identified Mr. E. M. Stern.

POOR COPY

(Testimony of N. I. Roope.)

Q. How was the bank paid for issuing those checks?

A. By cashier's check on the Fargo Bank for $6,500.00 and $7,500.00 in currency.

Q. Was anyone with Mr. Stern when he purchased the checks? A. Yes, sir.

Q. Did you know that individual?

A. I didn't know him.

Q. Do you see him here in the Court room?

A. Yes, sir.

Mr. Patten: May the record show that the witness identified Mr. F. C. Keane. You may cross-examine the witness.

Mr. Purdy: No cross-examination.

Mr. Patten: May this witness be excused?

The Court: With the permission of counsel he may be.

E. M. STERN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination [88]

Q. (By Mr. Patten): Will you give your full name? A. Emanuel M. Stern.

Q. And what is your address?

A. 1204 Broadway, North Dakota.

Q. You are a lawyer? A. That is correct.

Q. And how long have you practiced law?

A. 22 years.

Q. Do you know the defendant in this proceeding? A. Yes, sir, I do.

Q. How long have you known him?

(Testimony of E. M. Stern.)

A. Since, I believe, 1943.

Q. You have been handed Exhibit No. 17. With reference to that exhibit do you recognize it?

A. Yes, sir.

Mr. Emigh: May we ask the witness a question?

The Court: You may.

Q. (By Mr. Emigh): Did you at the time referred to represent Mr. McFee as his attorney?

A. Yes, sir, I was representing him.

Q. (By Mr. Emigh): The exhibit which you hold is a matter relating to that service?

A. Yes, sir.

Mr. Emigh: May it please the Court, if this witness testifies obviously it will be matters which he received the information concerning, while he was serving as attorney for Mr. McFee and would be privileged within his profession as [89] attorney.

The Court: I will not require him to put in any matters except as to the payment of money.

Q. Do you recognize these checks?

A. Yes, sir.

Q. With reference to the largest check, what is the amount of that? A. $12,500.00.

Q. From whom did you receive that check?

Mr. Emigh: We object to that as——

Mr. Patten: I will withdraw that.

Q. Will you tell me what you did with the check?

A. Deposited it in the Dakota National Bank at Fargo, North Dakota.

Q. Is that your indorsement? A. Yes, sir.

(Testimony of E. M. Stern.)

Q. Directly or indirectly was that check used to make payment to the District Court of the United States which I have listed here?

Mr. Emigh: We object to that as being within the privilege.

The Court: He may answer.

A. Partially.

Q. With respect to the smaller check, returning to the larger check, is that your indorsement?

A. Yes, sir. [90]

Q. What did you do with this other check?

Mr. Emigh: May the similar testimony as to this check go in under the same objection?

The Court: If there are any further grounds you may tell the Court, go ahead.

Q. The $12,500.00 check does that bear your indorsement? A. Yes, sir.

Q. And what was done with that?

A. Deposited to my account in the Dakota National Bank, Fargo, North Dakota.

Q. Now the smaller check, what is the amount of that? A. $3,000.00.

Q. Does that bear your endorsement?

A. Yes, sir.

Q. Tell the jury what you did with the funds involved in that check.

A. I cashed the check and gave the funds to my client.

Q. Who was your client? A. Mr. McFee.

Q. Will you tell the Court how you received those two checks? A. By mail, I think.

(Testimony of E. M. Stern.)

Q. From whom?

A. I don't exactly recall from whom, who may have sent them, I am quite certain that I received them by mail, this something over six years ago.

Q. With respect to the check for $12,500.00 you stated that [91] you used that to pay a fine?

Mr. Emigh: We object to that as repetition.

The Court: He may answer.

A. Yes, sir.

(By Mr. Patten): We offer the check in evidence.

Mr. Emigh: I would like to object to counsel's question, it is going beyond the matters stipulated to, it is a violation of the stipulation and it is highly prejudicial.

The Court: The jury will disregard the one word used in the question by counsel that it was for the payment of a fine, that would have nothing to do with this case.

Mr. Patten: I offer Exhibit No. 17 in evidence.

The Court: It may be admitted.

Q. Mr. Stern, did you represent McFee—I believe that you stated that you did.

A. Yes, sir, I did.

Q. Were you paid for your services in that connection?

Mr. Emigh: We object to that as being privileged.

The Court: He may answer.

A. Yes, sir.

Q. What amount were you paid?

(Testimony of E. M. Stern.)

Mr. Emigh: We make the same objection to this line of testimony.

The Court: He may answer.

A. $3,000.00.

Q. Did you receive anything else by way of expenses? [92] A. Yes, sir.

Q. How much? A. $1,500.00.

Q. And you received these funds from whom?

Mr. Emigh: I wish to move that the answer be stricken as to the payment of attorney's fee because the Government is limited to the amount of $3,000.00 attorney's fee in their bill of particulars and this is going in to matters beyond the bill of particulars to which they are limited.

The Court: The motion is denied.

Q. You say that you were paid $1,500.00 in expenses?

A. The $1,500.00 was not to me, but to Clayton Keane, attorney of Wallace, $3,000.00 was retained of the checks that I received, they have been mentioned.

Q. Will you give the jury an accounting of the funds that you received in connection with this matter, and the disposition you made of them.

Mr. Emigh: We object to that as going into the matter of the relationship between attorney and client. It is going beyond the boundaries of the bill of particulars.

The Court: He may answer.

A. I received a check for $12,500.00 and $2,-

(Testimony of E. M. Stern.)

500.00 which made a total of $15,000.00 then Mr. Keane and myself——

Q. What were the first funds that you received?

A. $2,500.00.

Q. What form was that? [93]

A. Currency.

Q. From whom did you receive that?

A. I cannot tell exactly but it was one of the three clients that I represented; that was in Fargo.

Q. Who were your clients, those three?

A. Mr. McFee, Mr. McDonald and Mr. Schwenk.

Q. What was the next amount that you received?

A. $12,500.00.

Q. And what was the first disbursement that you made out of those funds?

A. The first disbursement was the $2,500.00.

Q. And to whom did you make that?

Mr. Emigh: We object to that as repetition and it is incompetent, irrelevant and immaterial.

The Court: He may state who it was to.

A. To the Clerk of the United States District Court for the District of North Dakota.

Q. How was that made?

A. By cashier's draft.

Q. On what bank?

A. The Dakota National Bank.

Q. And the amount was $2,500.00?

A. Yes, sir.

Q. You were with Clayton Keane when you purchased the cashier's check that Mr. Roope testified about? A. Yes sir. [94]

(Testimony of E. M. Stern.)

Q. What did Mr. Keane pay the First National Bank or the Dakota National Bank I believe it was to Bismarck to obtain this cashier's check?

A. $2,500.00.

Q. Did you pay Mr. Francis Murphy in this matter? A. Yes, sir, I did.

Q. You paid him his fee? A. Yes, sir.

Q. Your fee and his fee amounted to what?

A. $6,000.00.

Q. Can you tell me Mr. Stern the funds in total that you received in connection with this matter?

A. $2,500.00 and $12,500.00.

Mr. Emigh: We object to this, it is repetition, the witness has testified twice to this matter.

The Court: He may answer, or rather the answer may stand.

Q. The first amount was $2,500.00?

A. Yes, $2,500.00.

Q. In currency? A. That is correct.

Q. And next was $12,500.00?

A. $12,500.00.

Q. And the next?

A. $3,000.00, however, this exhibit then was chased and returned [95] to Mr. McFee.

Q. According to my figures you paid the Clerk $16,500.00? A. Yes.

Q. And Mr. Murphy received with you, $23,-500.00? A. $22,500.00.

Q. And those are the funds that you received?

A. Yes.

Q. Those funds were supplied by Mr. Keane?

(Testimony of E. M. Stern.)

A. That is correct.

Q. And those amounted to $22,500.00?

A. That is correct.

Q. You received some expense funds I believe you stated? A. Yes, sir.

Q. How much was that? A. $1,500.00.

Q. How did you receive that?

A. Cash from Clayton Keane.

Mr. Patten: That is all, you may cross-examine.

Mr. Emigh: No questions at the present time of this witness.

The Court: We will recess at this time until 2:00 o'clock.

April 24, 1952, 2:00 o'clock p.m. [96]

Mr. Patten: In connection with the testimony of Mr. Emasio yesterday there was a matter that I want to clear up. We have agreed upon a stipulation.

The Court: You may state your stipulation.

Mr. Patten: The stipulation is as follows: It may be stipulated by and between the Government and the defendant that the general ledgers to which the witness Emasio testified to yesterday were the general ledgers of the business enterprises known as the North Idaho Sales Co.; the Foresters Club of Coeur d'Alene; the Foresters Club of Lewiston; the Gem Club of Athol, Idaho.

The Court: Then it may be so stipulated.

A. M. ERIKSOMEN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you tell the jury your address?

A. 704 Broadway, Fargo, North Dakota.

Q. What is your business? A. Banking.

Q With what bank?

A. The Dakota National Bank of Fargo. [97]

Q. What is your position with that bank?

A. Cashier.

Q. Do you have some official records of that bank that you were requested to bring here?

A. Yes, I have both the originals and copies.

Mr. Patten: I ask that this be marked as Exhibit No. 32.

Q. Do you recognize that document?

A. Yes, sir.

Q. Is it a part of the official records of that bank?

A. The permanent record of the savings account of E. M. Stern, in the Dakota National Bank from June 2, 1941 to December 3, 1947.

Mr. Patten: I would like to offer this in evidence. The copy that we propose to substitute is limited to 1946.

Mr. Emigh: The portions shown on the copy will be covered by that period?

Mr. Patten: That is right.

(Testimony of A. M. Eriksomen.)

Mr. Emigh: We have no objection insofar as that period is concerned.

The Court: Then you may have the copy marked as an exhibit.

Mr. Patten: I would like to have this marked as Plaintiff's Exhibit No. 33.

Q. Plaintiff's Exhibit No. 33 has been handed to you, is that an original record of the bank? [98]

A. This is a copy—this one (indicating) is the original record.

Q. The second piece of paper is a true copy?

A. Yes, it is.

Mr. Patten: I would like to offer this in evidence.

Mr. Emigh: No objection.

The Court: It may be admitted.

Q. Would you identify the exhibit to the jury?

A. This is a deposit slip.

Q. In your savings department?

A. In our savings department, to the credit of E. M. Stern, No. 3674, January 26, 1946 the total amount is $2,818.95, the deposit is broken down to show currency, $2,800.00 and $18.95 silver.

Q. You have been handed Exhibit No. 34, do you recognize that as an official record of the bank?

A. Yes, sir.

Q. Will you identify that?

A. That is a deposit slip of the Dakota National Bank, dated February 1, 1946 to the credit of E. M. Stern, No. 3674 showing a deposit of $12,474.83 consisting of one item of $12,500.00 less a balance

(Testimony of A. M. Eriksomen.)

on bond deal of $25.17 showing a total deposit of $12,474.83.

Q. Is there any notation to identify the $12,500.00 item? A. A transit No., 92-56.

Q. What does that relate? [99]

A. The transit number can be identified as the bank that it was drawn on.

Q. You do not recall that?

A. No, I do not recall, but it could be ascertained.

Mr. Patten: I would like to offer Exhibit No. 34 in evidence.

Mr. Emigh: We wish to object to it as not properly identified. There is no proper foundation laid for the admission of the same.

The Court: It may be admitted, all of this has to be put piece-meal, the whole case cannot be put in at one time.

Q. Now you have been handed Exhibit No. 17, with reference to that exhibit, does that aid your memory as to the clearance number on Exhibit No. 34?

A. 17 is drawn—that is Exhibit No. 17 is drawn on the Idaho First National Bank, number 92-56 which would indicate that this item bears the indorsement of our bank dated February 1, 1946 which would indicate that this is the item deposited in the savings account.

Q. Now, you have been handed Plaintiff's Exhibit No. 35, can you identify that?

A. Yes, this is a cashier's check drawn by the

(Testimony of A. M. Eriksomen.)

Dakota National Bank of Fargo, North Dakota, No. 56734 dated February 18, 1946 payable to the Clerk of the United States District Court in the amount of $2,500.00.

Q. And the indorsement, will you give that?

A. Pay to the order of the First National Bank and Trust Co. of Fargo, North Dakota, Clerk of the United States District Court, Beatrice A. McMichael, Clerk, No. 216.

Mr. Patten: I want to offer this in evidence as Plaintiff's Exhibit No. 35.

Mr. Purdy: No objection.

The Court: It may be admitted.

Q. Mr. Eriksomen, you have been handed Plaintiff's Exhibit No. 36, do you recognize that as an original record of your bank? A. Yes, sir.

Q. Will you identify it?

A. It is a cashier's check of the Dakota National Bank, Fargo, North Dakota, payable to E. M. Stern for $6,500.00 dated March 6, 1946.

Q. Will you read the endorsement on that?

A. The Merchant's National Bank and Trust Co. paid March 23, 1946, Fargo, North Dakota, through clearing house and another indorsement, pay to the order of any bank, banker, or trust company. All prior indorsements guaranteed March 21, 1946, The First National Bank, Bismarck, North Dakota, B. F. Lawyer, Cashier.

Mr. Patten: I would like to offer that in evidence.

Mr. Purdy: No objections.

(Testimony of A. M. Eriksomen.)

The Court: It may be admitted.

Q. To whose account were those cashier checks charged, who [101 was the purchaser?

A. A withdrawal in the identical amount was made from the savings account of E. M. Stern in payment of these cashier's checks.

Mr. Patten: The witness is available for cross-examination.

Mr. Purdy: No questions.

F. CLAYTON KEANE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you state your name? A. F. Clayton Keane.

Q. Will you spell your last name?

A. K-e-a-n-e.

Q. And what is your address?

A. Wallace, Idaho.

Q. No further address is necessary?

A. No, I think I am notorious enough with just that.

Q. What is your business or occupation?

A. I formerly practiced law until October 6 of last year, presently I am not employed.

Q. How long did you practice law? [102]

A. 30 odd years.

Q. And how long in Wallace?

A. Over 20 years.

(Testimony of F. Clayton Keane.)

Q. Do you know the defendant in this proceeding? A. Yes, sir, I do.

Q. How long have you known him?

A. Probably 30 years.

Q. Do you know him professionally?

A. Yes, sir.

Q. And did you know him socially?

A. Yes, sir.

Q. Was that acquaintance-ship a close one?

A. Yes, I think it was and it still is.

Q. I will ask you if you recognize the documents that you have in your hand?

Mr. Emigh: We object to this witness testifying as to the exhibits on the ground that it is privileged.

The Court: Mr. Emigh, I think probably that is an objection that you could not make. I think the witness may answer.

A. It is my desire to claim the privilege on the ground that the evidence is privileged, it is a transaction and a conversation that came to me in my capacity as an attorney, at that time I was representing Mr. McFee. I might state that at that time I was employed by Mr. McFee and had been for a number of years on a retainer basis. [103]

The Court: You will not be required to impart any conversation that is confidential, anything that Mr. McFee might have said, but you can testify as to those checks, where they came from and what was done with the money.

A. Very well, particularly as to Exhibit No. 17, it is my recollection that Mr. McFee——

(Testimony of F. Clayton Keane.)

Q. What is the amount of that?

A. $12,500.00.

Q. And what is the date?

A. January 28, 1946. It is my recollection that on that date Mr. McFee, either in my office or some other place around Wallace, gave me $12,-500.00 with instructions to secure a cashier's check. As I recall I turned it to my secretary and told her to get it, and that, I imagine, she did.

Q. What was the funds that you received, was it cash? A. Currency.

Q. Do you recall the second check?

A. I have no recollection but it was probably handled in the same manner. I don't think that I ever saw those cashier's checks until today in the Court room.

Q. Mr. O. L. Jones testified that the records show you to be the purchaser of the second check.

A. I have no independent recollection but it was probably handled by my secretary. I think that is the way it occurred.

Q. Have you been present in the Court room?

A. A part of the time, yes sir.

Q. Did you hear the testimony of——

Mr. Emigh: Now, if the Court please, I object to that as a comparison, an attempt to compare the testimony of another witness on the stand and to suggest to this witness that his testimony should conform with the other testimony and it is in the form of a leading and suggestive proceeding.

(Testimony of F. Clayton Keane.)

The Court: I suggest that the attorney finish with his question.

Mr. Emigh: But I think it is immaterial.

The Court: The Court will rule on that.

Mr. Patten: The witness has been handed Exhibit Nos. 30 and 31.

Q. Will you identify the documents which you hold in your hand, Mr. Keane?

A. They are cashier's checks, one in the sum of $2,500.00 and the other in the sum of $11,500.00 on the First National Bank of Bismarck, North Dakota.

Q. And the date?

A. March 21, 1946, each of them bears the same date.

Q. Do you remember or recognize those checks?

A. Yes, sir, I do.

Q. What if anything—did you purchase those checks?

A. It was a joint enterprise, the purchase was.

Q. How much of the funds did you supply to purchase those checks?

A. I would like to make an objection that it is a confidential [105] relationship between me and the parties interested in obtaining this money.

The Court: You may answer.

A. If I recall correctly, Mr. McFee, Mr. Schwenk, and Mr. McDonald, in a room of the hotel, I think it was the—I am not sure I think it was the Luna Hotel.

Q. That is a small hotel? A. Yes.

(Testimony of F. Clayton Keane.)

Q. You may go ahead with your answer Mr. Keane.

A. After certain proceedings that we had, I joined some other individuals in the room that one of us had there——

Q. ——Who were the individuals?

A. R. E. McDonald, Mr. Fred Schwenk and A. F. McFee.

Q. This meeting was on March 21?

A. Yes, Mr. McFee turned to me something in excess of $9,000.00, there was included in that a check of $500.00 but most of it was in currency, but there was a check for $500.00 on the Lewiston bank which was cashed in the bank in Bismarck, North Dakota.

Q. How much of these funds did you turn to the bank?

A. I think $7,500.00 paid for the purchase of the cashier's checks, $1,500.00 turned to Mr. Stern and if I recall correctly $400.00 or $500.00 that was returned to Mr. McFee by myself.

Q. Do you have with you a note signed by Mr. Fred Schwenk?

A. I do not, I made a search for it. It has been in my possession [106] but I didn't find it, I have a copy of it.

Q. With you? A. Yes, sir.

Q. It is embodied in a complaint which was prepared for filing an action?

A. The action was never instituted.

Q. Will you use that to refresh your memory?

(Testimony of F. Clayton Keane.)

A. I think this is objectionable but I can do it.

Mr. Emigh: I think the defendant objects that this is a privileged communication between client and counsel.

Mr. Patten: I didn't understand that he was attorney for Schwenk.

A. I didn't so state. I was acting for Mr. McFee and there was placed in my hands for the purpose of suit, and a complaint was prepared under my supervision, the action was never instituted. We didn't want to spend any more money, there was no reason to throw good money after bad.

Q. Who employed you to sue?

A. Mr. McFee.

Q. Will you read the amount of that note?

A. $5,500.00.

Q. The date of the note?

A. January 31, 1946.

Q. January 31, 1946?

A. According to the copy that I am refreshing my memory from.

Q. Do you know Robert McDonald? [107]

A. Yes, sir.

Q. How long have you known him?

A. About 20 years.

Q. Do you know him intimately?

A. Yes, intimately.

Q. What transaction, if any, have you had with Mr. McDonald—I believe that is too general.

A. Yes, I think it is.

(Testimony of F. Clayton Keane.)

Q. Did you loan any money to Mr. McDonald in 1946?

A. I would say no, I can explain that, there was a check written by me for $4,750.00 payable to Mr. McDonald and he indorsed that check, the money was actually advanced by someone else, it wasn't my money.

Q. Whose money was it?

A. Again I am claiming the privilege.

The Court: You may go ahead.

A. Mr. McFee's.

Mr. Patten: We submit the witness for cross-examination.

Cross-Examination

Q. (By Mr. Purdy): You did make an endeavor to collect the Schwenk note to the extent——

A. ——Yes, to the extent that we prepared a complaint, the action [108] was ready to be filed. We determined that there was no use.

Q. But it was placed in your hands for collection? A. It was, yes, sir.

Mr. Purdy: That is all.

Mr. Patten: That is all.

J. A. ALLEN

Called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten:) Will you spell your name? A. A-l-l-e-n.

(Testimony of J. A. Allen.)

Q. Where do you reside Mr. Allen?

A. Spokane, Washington.

Q. You have resided there for some time?

A. Since 1935 or 1937.

Q. What is the nature of your business?

A. Mining.

Q. How long have you been engaged in that business? A. 15 years.

Q. Are you acquainted with Mr. McFee, the defendant here? A. Yes, sir.

Q. How long have you known him? [109]

A. 15 years.

Q. Have you had any business dealings with Mr. McFee? A. Yes, sir.

Q. During the year 1946 did you have any business dealings with Mr. McFee?

A. Yes, sir, I did.

Q. Did you sell him any stock?

A. Yes, Coeur d' Alene Consolidated Mining Stock of which I am president—Mr. McFee purchased 150,000 shares for the total sum of $15,000.00.

Q. When was that?

A. A payment of $10,000.00 was made in cash and was sent to the company office in Wallace, Idaho on December 31, 1946.

Q. Did you receive any money from Mr. McFee in payment of this prior to that time?

A. A $5,000.00 check.

Q. That was paid to you?

A. Yes, I think it was.

Q. Did you cash the check?

(Testimony of J. A. Allen.)

A. Yes, the records would show that.

Q. You have been handed Exhibit No. 22, marked for identification, can you identify that?

A. Yes, that is a deposit slip for the Idaho First National Bank to the credit of J. A. Allen dated December 31, 1946, the total deposit showing $20,000.00.

Q. And what bank is that on? [110]

A. The Idaho First National of Wallace, Idaho.

Q. Did you deposit that?

A. The secretary in the office did.

Q. For you? A. Yes, sir.

Q. Do you have a duplicate deposit slip made at that time? A. Yes, sir.

Q. Will you refer to that, and where the printed word "currency" is, do you have anything written?

A. I do.

Q. And what was that? A. A. F. McFee.

Q. What does that indicate, that it was deposited to your account? A. Yes, sir.

Q. And how did you receive that?

A. I don't know just how, I know that it was not given to me but Mr. Grismer who was in charge of the operation, I think that he brought it to the office—it was from Mr. McFee.

Q. Was it paper or check?

A. Currency, as to the denominations, I don't know.

Q. That was deposited to your account?

A. Yes, for the Coeur d' Alene Consolidated, it was just being organized and they didn't start a

(Testimony of J. A. Allen.)

bank account until May 1947.

Q. That was for the purchase of stock? [111]

A. I cannot say because he had loaned—he had made loans for the payroll which had been repaid. Whether the previous payment in 1946 would constitute a loan or a part of this I would have to consult the records. However as this money was deposited, $10,000.00 in a check from another party, and that was paid out.

Q. But this $10,000.00 was for the payment of this stock? A. Yes, sir.

Q. And you put it in the bank?

A. Yes, sir.

Q. Did you issue the stock to Mr. McFee?

A. Yes, the record shows certificate number 40 for 150,000 shares delivered to Mr. McFee; the certificate in my name, J. A. Allen; somewhere near February 16, 1947 he informed the office that he had this stock as collateral or was going to use it as collateral and that he misplaced the certificate and we stopped any transfer on that certificate and issued certificate number 53 in the amount of 150,000 shares to A. F. McFee.

Mr. Patten: The Government asks that Exhibit Number 22 be admitted in evidence.

Mr. Purdy: It has not been identified and we object.

The Court: It may be admitted.

Mr. Patten: You may cross-examine.

Mr. Purdy: No cross-examination. [112]

M. R. ARNOLD

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): How do you spell your last name? A. A-r-n-o-l-d.

Q. Will you give your address?

A. 701 Foster, Coeur d' Alene, Idaho.

Q. How long have you lived here?

A. About two years.

Q. What is the nature of your business?

A. Tavern operator.

Q. And where was the tavern?

A. At State Line Village.

Q. What is the name of it?

A. The First and Last Chance.

Q. How long have you operated that?

A. Since 1942.

Q. Do you know Mr. McFee, the defendant in this action? A. Yes, sir.

Q. How long have you known him?

A. 30 years.

Q. Have you been quite well acquainted with him? [113] A. Yes, sir.

Q. Have you had any business relations the last few years? A. Yes, sir.

Q. And have you known him socially?

A. Yes, very well.

Q. Directing your attention to the month of March, or the first part of April, 1945, will you state whether or not you borrowed any money from

(Testimony of M. R. Arnold.)

the defendant in this action, Mr. McFee?

A. Yes, I did.

Q. How much? A. $5,000.00.

Q. How did you receive that?

A. In United States currency.

Q. Did you give any evidence of that to Mr. McFee? A. I gave him a note.

Q. Calling your attention, Mr. Arnold, to on or about the 7th of June 1947 I will ask you if you borrowed any money at that time from Mr. McFee, the defendant here? A. Yes, sir.

Q. How much? A. $2,000.00.

Q. Was that evidenced in any way?

A. No.

Q. How did he give you that money? [114]

A. In currency.

Q. Did you receive any additional money about that time? A. Yes, $1,400.00.

Q. And how did you receive that?

A. In currency.

Q. Did you evidence that by any note?

A. No, sir, no note.

Q. During 1945 or 1946 did you repay this money that you had borrowed?

A. No, I didn't.

Q. I will ask you to state whether or not prior to 1945 you borrowed any money from Mr. McFee?

A. Yes, sir.

Q. I will ask you whether or not you repaid Mr. McFee the money that you borrowed from him?

A. I have not.

(Testimony of M. R. Arnold.)

Q. Have you paid it now, at this time?

A. Yes, sir.

Q. When did you pay this money?

A. About the first of 1949 or the latter part of 1948.

Q. You didn't pay any of it back in 1945 or 1946? A. No, I didn't.

Q. With reference to those notes that you say that you gave Mr. McFee, did you receive those notes back from the defendant?

A. No sir, I didn't. [115]

Q. Do you know why? A. No, I don't.

Q. You didn't receive them back?

A. No, sir.

Q. Did you ask him to return them?

A. Once.

Q. And he didn't?

A. They were lost, he said.

Q. In any event, he didn't return them?

A. No, he didn't.

Mr. Patten: You may cross-examine.

Mr. Purdy: No cross-examination.

ROGER W. GREENOUGH

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you spell your last name? A. G-r-e-e-n-o-u-g-h.

(Testimony of Roger W. Greenough.)

Q. Where do you reside?

A. At the Atlas Mine, Mullan, Idaho.

Q. How long have you resided there?

A. Intermittently since 1924. [116]

Q. What is your business?

A. Currently I am president of the Atlas Mining Company.

Q. Do you know the defendant in this proceeding? A. Yes, sir, I do.

Q. Have you known him very long?

A. I would say for 27 or 28 years.

Q. Have you known him very well?

A. Very well, I think.

Q. You have been handed Plaintiff's Exhibit Number 19, do you know anything about that document? A. That is a cashier's check.

Q. What is the date of that?

A. November 2, 1946—I never saw it before.

Q. During the year 1946 did you purchase any cashier's checks at the Idaho First National Bank at Wallace? A. Not that I recall.

Q. Did you have any dealings with the Idaho First National Bank in 1946?

A. Yes, while I was residing in California a loan was arranged for me through Mr. McFee at the Idaho First National Bank.

Q. What was the purpose of that loan?

A. Well, I had——

Mr. Purdy: ——I don't think it is material.

Mr. Patten: I will admit that this is a little leading, but it is necessary to lead this witness to

(Testimony of Roger W. Greenough.)

give him the background. [117]

The Court: He may answer.

A. I was buying and selling real-estate in California. There was an opportunity there whereby I could use some money for a few months.

Q. Did you make any effort to obtain the money?

A. I had no banking connections there, we had property but it was unimproved.

Q. What did you do about this transaction?

A. Well, I wrote to Mr. McFee.

Q. And what did you say?

A. Substantially I outlined my situation with respect to collateral and assets and I told him that I had some property that was not acceptable as bank collateral and I didn't know what kind of financial condition he was in at that time; however, I would like to get this money and if he was not in shape to let me have it I asked him if he would go over and speak to Pete Jones and see if a loan could be arranged.

Q. What amount did you mention in your letter?

A. Well, I imagine that it was $5,000.00—that is the amount that I got.

Q. What was the date of that?

A. I would not have known unless I had seen and heard some of this testimony. I wouldn't have recalled that.

Q. Was that in the Fall?

A. Yes, it is evident that it was in the Fall, of 1946, this is dated in November. [118]

(Testimony of Roger W. Greenough.)

Mr. Purdy: I think this is rather irregular, I object to this on the ground that no proper foundation is laid.

The Court: He may answer, you may proceed Mr. Patten.

Q. Have you finished?

A. Well, it was about—it was apparently in the Fall of 1946, this ties up pretty well with my activities down there.

Q. Did you receive any answer from Mr. McFee? A. No, sir.

Q. What response did you receive from your letter?

A. A short letter from Mr. Jones of the Idaho First National Bank enclosing a note for my signature.

Q. What did the letter say?

A. It was a very short business letter.

Mr. Purdy: We object to this evidence, the letter would be the best evidence.

Q. Do you have the letter?

A. No, I don't, I looked for the letter and was unable to find it—I looked day before yesterday.

Q. Will you tell us, to the best of your memory, what was in the letter?

A. Well the principal thing was that Mr. McFee——

Mr. Emigh: ——This is an extra-judicial statement, it seems now that it is to be very prejudicial and we object to the testimony, it doesn't appear to be Mr. McFee's letter or in any manner to point to

(Testimony of Roger W. Greenough.)

Mr. McFee, and it would not bind him in any way. It is highly prejudicial and no proper foundation has been laid for the contents of this letter by [119] secondary evidence.

The Court: He may answer.

A. The principal thing that I was interested in was that Mr. McFee had called and told Mr. Jones or substantially that—that I would like to have a loan and that if I would sign the enclosed note and return it to the bank that the money would be on deposit for me whenever they got the note in the bank.

Q. Did you receive the funds? A. Yes.

Q. Did you repay that note?

A. Yes, I forget whether it was 3 or 6 months but I repaid it.

Mr. Patten: You may cross-examine the witness.

Cross-Examination

Q. (By Mr. Purdy): When did you pay that?

A. It was prior to the time it was due, I think it was in the spring of 1947.

Mr. Patten: May I ask one more question?

Mr. Purdy: Yes, go ahead.

Q. (By Mr. Patten): Did you repay that to the bank? A. Yes, sir, to the bank.

Mr. Patten: Thank you. [120]

Cross-Examination

Q. (By Mr. Purdy): You knew Mr. McFee

(Testimony of Roger W. Greenough.)

when he was a resident of Washington when he lived at Spokane?

A. Yes, I didn't think of that but I do believe that he was at the time I first knew him, but I met him the first time in Wallace, but I believe his residence was Washington.

Q. You testified that you got a letter from the bank after having addressed a letter to Mr. McFee telling Mr. McFee to tell them that you wanted a loan? A. Well, yes, he told the bank.

Q. And with that letter from the bank was a note to the bank for you to sign?

A. Yes, sir, with the letter from the bank.

Q. And you paid the bank when you paid the note off? A. Yes, sir, I paid the bank.

Q. The note was not made to Mr. McFee?

A. I never heard from Mr. McFee.

Q. And you paid no money to McFee?

A. I paid no money to him.

Mr. Purdy: That is all.

Mr. Patten: That is all.

The Court: We will take a recess at this time for 15 minutes. [121]

April 24, 1952, 3:15 o'clock p.m.

A. F. McCAIN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Where do you live Mr. McCain?

(Testimony of A. F. McCain.)

A. Kellogg, at 603 South Division Street.

Q. And what is your business?

A. Grocery merchant.

Q. How long have you been in this business?

A. About 38 years.

Q. Where is your store located.

A. 127 McKinley.

Q. And what is the trade name of that store?

A. McCain's New Grocery.

Q. Do you know the defendant in this action, Mr. McFee? A. Yes, sir.

Q. How long have you known him?

A. 20 or 25 years.

Q. Directing your attention to the year—directing your attention around 1935, did you have any business dealings [122] with him?

A. He was employed in our meat department.

Q. In what capacity?

A. He was manager of the meat department which included other work.

Q. How many people were working in that department?

A. I think one at that time and possibly a second one worked too.

Q. When was Mr. McFee first employed by you?

A. In 1934 or 1935, our records were destroyed by fire.

Q. How long was he employed by you?

A. 8 or 10 months.

A. How long have you known him?

A. 20 or 25 years.

(Testimony of A. F. McCain.)

Q. Have your relationships been very cordial?

A. Yes, quite cordial.

Q. He was a close friend of yours?

A. Yes, a close friend.

Q. What salary did he earn?

A. 50 or 60 dollars a week salary with a 25% bonus on any earnings.

Q. Do you know whether he earned his bonus?

A. Some months yes, and some months no.

Q. What were Mr. McFee's duties in the store.

A. He operated the meat department, cutting meat and waited on the trade. [123]

Q. Who else was in the meat department?

A. I cannot be sure whether Mannie Andrews came at that time; he took over when Mr. McFee left.

Q. Did Mr. McFee cut the meat that was sold in the grocery store? A. Partially, yes.

Mr. Patten: We submit the witness for cross examination.

Cross Examination

Q. (By Mr. Purdy): You knew Mr. McFee while he was a resident of the state of Washington?

A. I think he was in the first place.

Q. That was in the '20s? A. Later '20s.

Q. Do you know whether Mr. McFee had other activities besides working for you?

A. Well——

Mr. Patten: ——Will you please set the date for that?

Q. Any time that you are testifying to.

(Testimony of A. F. McCain.)

A. I think he was starting operations in the slot machines line during a part of that time; I would not be sure about that.

Q. Slot machines, pin palls and things of that time? A. Yes, during the latter part.

Q. Do you know of any financial *bac standing* that Mr. McFee might have when you first got acquainted with him,—whether [124] he was a man of means or without means?

Mr. Patten: We object to that as calling for a conclusion of the witness.

The Court: It is not proper cross examination, I will sustain the objection.

Q. Do you recall any particular circumstances surrounding the fact that Mr. McFee went to work for you?

A. Yes. We had a man that we had to let go all at once and knowing Mr. McFee and knowing that he was a butcher I called him and asked him to take over to help us out and he said that he would.

Mr. Purdy: That is all.

Redirect Examination

Q. (By Mr. Patten): You have testified in reference to the period that Mr. McFee was employed,—you testified that he was engaged in another business?

A. That is my remembrance, that he was starting out in the line that he continued in.

Q. What time did the store open?

(Testimony of A. F. McCain.)

A. At eight o'clock.

Mr. Emigh: We object to this line of questioning as it is in the nature of cross examination by the Government of [125] their own witness and it is an attempt to impeach the witness.

The Court: The answer may stand, you may proceed. I haven't noticed that it was cross examination. You brought that out on cross examination as to his activity.

Q. What time did you open?

A. Eight o'clock.

Q. And what time did you require the employees to be there?

A. Not ahead of that time but sometimes he came ahead of time to line up the cases.

Q. What time did your store close?

A. At that time we closed at 6 o'clock, we close at 5:30 now.

Q. What time did you permit the employees to leave the store?

A. They were supposed to close up the butcher shop and he is allowed a few minutes, five or ten minutes to clean up according to the union rules.

Mr. Patten: That is all.

Mr. Purdy: That is all.

DAN MURPHY

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you state your name? [126] A. Dan Murphy.

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(Testimony of Dan Murphy.)

Q. And how do you spell Murphy?

A. M-u-r-p-h-y.

Q. Where do you live Mr. Murphy?

A. Wallace, Idaho.

Q. How long have you been there?

A. I have been there since 1908.

Q. What is your business? A. Mining.

Q. How long have you been engaged in mining?

A. Steady since I was 16 years old until a few years ago.

Q. Are you presently engaged in mining?

A. I am in partnership. I don't do any mining any more.

Q. Do you know Mr. McFee sitting at the table here (indicating)? A. I certainly do.

Q. How long have you known him?

A. Around 30 years.

Q. Have you known him very well?

A. Yes, sir, as well as anybody, I think.

Q. Have you had any business transactions with him?

A. Yes, sir, we had an agreement in the mining business.

Q. When did you enter into this agreement?

A. In 1945, I think it was, I ain't sure, my memory isn't what it used to be.

Q. What was the agreement?

Mr. Purdy: If the agreement is in writing it would [127] be the best evidence of the terms unless he just wants a general statement.

Mr. Patten: Just a general statement.

(Testimony of Dan Murphy.)

Q. What was this business transaction that you had with Mr. McFee?

A. Mr. McFee was going to put up the money and I was going to run the properties.

Q. What were those properties?

A. The Dan Mac Lease.

Q. Where was that?

A. In the Burke canyon.

Q. On the right hand side? A. Yes, sir.

Q. When did you start to develop the Dan Mac Lease?

A. We put men in there in 1945 and later I took it over in 1946 then it was a short time when we shut down.

Q. It was in operation in 1945 and 1946?

A. Partly in 1945 and partly in 1946.

Q. Was the operation successful?

A. No, they were not, that is why we shut it down. It was getting poorer all of the time.

Q. You mentioned an agreement,—in general what was this agreement, what were you to furnish?

A. My part of it was to run the property that we leased or owned.

Q. And what was Mr. McFee to do? [128]

A. Put up the money.

Q. Did you put up any money?

A. No, sir.

Q. Do you know how much money Mr. McFee put up?

A. No, I haven't any idea at all.

Mr. Patten: You may cross examine.

Mr. Purdy: No questions.

JOHN R. MATTHEWS

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you spell your last name? A. M-a-t-t-h-e-w-s.

Q. Where do you live Mr. Matthews?

A. Wallace, Idaho.

Q. What is your address?

A. 149 King Street.

Q. What is your present business?

A. Employed by the Hecla Mining Company.

Q. What was your business prior to that?

A. I have been with the Hecla Company since I have been in Wallace, that is, since 1937. [129]

Q. Do you know the defendant, Mr. McFee?

A. Yes, I do.

Q. Do you know him intimately?

A. Quite well.

Q. How long have you known him?

A. About 12 years.

Q. Do you recognize Plaintiff's Exhibit No. 8 which was handed to you?

A. Yes, this appears to be a partnership return of income tax for the year 1945.

Q. Does your name appear on it?

A. I have signed it as the person preparing the return.

Q. Is there any other signature on the back of that return?

(Testimony of John R. Matthews.)

A. Yes, Mr. McFee's,—A. F. McFee's signature appears on there.

Q. Do you recognize that signature?

A. I think it is his signature.

Mr. Patten: I offer Exhibit 8 in evidence at this time.

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. Would you further identify that return?

A. It is a partnership return for the year 1945 on the Dan Mac Lease; this was in operation during that year.

Q. From your knowledge and experience can you tell who the partnership was, who were the partners?

A. I am looking at Schedule I; the partners shown on this return are A. F. McFee; Dan Murphy, W. J. Emasio and Ross [130] Roundy.

Q. What income was reported on this exhibit?

A. $28,652.51 loss is shown.

Q. How was that apportioned?

A. Entirely to Mr. McFee.

Q. Why was it so apportioned?

A. The return states the profit and loss to be shared in proportion to the capital investment.

Q. Now, you have been handed Exhibit No. 9 marked for identification, do you recognize that?

A. This appears to be a partnership return for the year ending December 31, 1946, for the Dan Mac Lease.

Q. Is your signature on that document?

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(Testimony of John R. Matthews.)

A. Yes, in the same way as it did on the 1945 return.

Q. You state that it appears to be a partnership return, is there any doubt in your mind about that?

A. I didn't mean to indicate that there was.

Q. What is the other signature on that page?

A. A. F. McFee signed it as being a partner in the same manner as the 1945 return.

Mr. Patten: I offer Exhibit No. 9 in evidence.

The Court: Have you any objections?

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. During 1946 who were the partners in the Dan Mac Lease, or [131] doing business under the name of the Dan Mac Lease?

A. According to the return, A. F. McFee, W. J. Emasio, Dan Murphy.

Q. What profit does the return show?

A. This shows a loss of $24,549.15.

Q. And how was that apportioned?

A. To A. F. McFee.

Q. Does it show why it was so apportioned?

A. The losses apportioned according to the capital investment.

Q. Do you, or rather did you keep the books of the Dan Mac Lease partnership?

A. Yes, sir.

Q. Did you keep those books for the years covered by the returns? A. Yes, sir.

Q. Are those returns in agreement with the books?

(Testimony of John R. Matthews.)

A. I think they are; I haven't the books to see at this time, but I presume that they are.

Q. Was there a capital account in those books?

A. Yes, sir.

Q. Will you explain to the jury just what a capital account is?

A. This was a partnership and the capital account represents the investment of the partnership or rather the investment of the partners in the business or enterprise.

Q. Is that simply the money that has been put in the business plus the earnings? [132]

A. Yes, sir, or minus the losses, it would be the equity in the business.

Q. Did you keep this partnership account?

A. Yes, sir.

Q. Did you post that account? A. Yes, sir.

Q. From what records did you post this account?

A. From whatever sources of entry were available.

Q. And what would those be?

A. The usual source of entry is anything that is for the purpose of recording the financial transactions. The cash receipts book and the cash disbursements vouchers.

A. A proprietorship account?

A. From a summation of the investments plus and minus the profit or loss.

Q. How did you post the investment in the business?

A. Through the cash receipts from the partners.

Q. What piece of paper was this or what pieces

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(Testimony of John R. Matthews.)

of paper were those cash receipts posted from?

A. The deposit tickets.

Q. To the bank? A. Yes, to the bank.

Q. To what bank?

A. I believe that this was kept in the Idaho First National.

Q. Do you recognize Plaintiff's Exhibit No. 21, have you ever seen these records before? [133]

A. No, I never did, these are deposit slips, I didn't make them myself, I might have seen copies of those.

Q. Have you seen copies of them?

A. Yes, I believe I have.

Q. Copies of those,—were they the records from which you posted this proprietorship account?

A. Yes, sir.

Mr. Patten: I want to offer this exhibit in evidence at this time.

The Court: If there is no objection it will be admitted.

Q. Can you run through those records and read them including the description of the funds deposited, whether it was a check or currency. Give us the date, the amount, and the description.

A. The first one is dated February 1, 1945, Dan Mac Lease 303 6th Street; A. F. M. 10927 and that is for $1,000.00. The next is dated February 23, 1945, with no notation on it and it is in the amount of $500.00. Here is another dated March 17, 1945, for $2,000.00 and that amount appears opposite the word "currency," the next is April 7, 1945, for

(Testimony of John R. Matthews.)

$2,000.00 opposite the word "currency," the next is May 2, 1945, for $2,000.00 opposite the word "currency," June 4, 1945, $2,000.00 "currency," next is June 15, 1945, $2,000.00 opposite the word "currency," the next is July 10, 1945, $1,000.00 opposite the word "currency"; the [134] next is July 17, 1945, $1,000.00 opposite the word "currency"; the next is July 28, 1945, that is for $2,000.00 opposite the word "currency"; the next is August 14, 1945, opposite the word "currency" $2,000.00; the next is September 6, 1945, currency, $1,000.00; the next September 19, 1945, that appears to be opposite the letter "T" for $2,000.00 that is not opposite the word "currency." Here is one dated September 28, 1945, currency $2,000.00; the next is October 5, 1945, on that deposit slip are the numbers 93-29 and opposite that is $1,556.84 opposite the numbers 93-29 is $698.56 for a total of $2,255.40; the next is October 27, 1945, apparently that is not currency it is in the amount of $3,000.00; the next is November 7, 1945, opposite the word "currency" $2,000.00; the next is November 13, that is apparently another transit check the numbers 1-74, that is for $172.98; the next is December 4, 1945, that bears an initial of some kind I cannot read it, $4,800.00. The next one is currency dated January 30, 1946, that is for $1,600.00; the next is February 20, 1946, currency $2,000.00; the next February 23, 1946, with the letter "T" $1,800.00; the next is dated March 4, 1946, it has the letters A. F. and R. number 93-29 that is for $624.49; the next one

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(Testimony of John R. Matthews.)

is dated March 16, 1946, with the letter "T" $1,183.35; the next is March 30, 1946, currency $1,000.00; the next one is dated April 4, 1946, currency $1,500.00; [135] the next one April 13, 1946, that has the letter "T" $131.48; the next one is dated April 16, 1946, and there is an item of $69.20 that item does not seem to be currency or silver; the next one is April 25, 1946, currency $800.00; and the next is May 6, 1946, currency $1,450.00. Here is one for May 20, 1946, apparently that is currency $500.00 and another item of $9.13 a total of $509.13; the next one is January 5, 1946, currency $1,900.00; the next one is dated June 24, 1946, for $1,000.00; the next one is July 1, 1946, that has the letter "T" for $72.50.

Q. How many more are there in this exhibit?

A. I would say about 20.

Mr. Patten: May I submit them to the jury?

The Court: You may do so.

Q. What are the items in these documents. Did you handle the items marked currency, if so how were they handled on the books?

A. I believe that I credited all of the investment to A. F. McFee.

Q. The odd amounts, that have other identification marks beside currency there, what was done with them?

A. Those would be miscellaneous receipts, most of it was ore returns,—they made a few ore shipments.

Mr. Patten: I believe you may cross examine.

(Testimony of John R. Matthews.)

Mr. Emigh: May we defer this cross examination until we examine the exhibits? [136]

The Court: You may look at the exhibits at this time and we will go ahead with the cross examination.

Mr. Emigh: I have no examination at this time of this witness.

The Court: I think that if the trial is to proceed in an orderly manner he should be cross examined at this time but you may call him later as your witness if you find that you want him later.

Mr. Emigh: Very well, we have no cross examination at this time.

RAY F. OLSEN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Where do you reside, Mr. Olsen? A. Provo, Utah.

Q. How long have you resided in Provo, Utah?

A. Four months.

Q. Where did you reside before you resided in Provo? A. Coeur d'Alene.

Q. What is your occupation?

A. Internal Revenue Agent. [137]

Q. How long have you been such Internal Revenue Agent? A. Approximately 10 years.

Q. Continually?

A. I was in the Army four years.

Q. And what is your education?

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(Testimony of Ray F. Olsen.)

A. I graduated from the University of Utah.

Q. Are you an accredited accountant in Idaho?

A. A C.P.A. in Idaho, yes.

Q. Have you examined any books belonging to a partnership known as the Dan Mac Lease?

A. Yes, sir.

Q. When did you examine those records?

A. Well, that was about,—1948.

Q. Who furnished those records for you to examine? A. John Matthews.

Q. Did you examine any particular proprietorship account in 1945 and 1947, or rather for those years? A. Yes.

Q. What does the proprietorship account show?

Mr. Emigh: We object to this as incompetent, irrelevant and immaterial, the account is in Court and made available for inspection.

The Court: I understand that those are in your possession, you may cross examine him on those matters, if you desire. I believe at this time it is time for adjournment now and we will recess until tomorrow morning at 10:00 o'clock. [138]

April 25, 1952, 10:00 o'clock a.m.

The Court: You may answer that question, Mr. Olsen.

A. The proprietorship account represents the investment of any individual in the property and shows his withdrawals, shows his ownership in any given endeavor.

Q. What was this account called in the books of the Dan Mac Lease?

(Testimony of Ray F. Olsen.)

A. A. F. McFee Investment.

Q. Does that show how much Mr. McFee invested in the Dan Mac Lease? A. Yes, sir.

Q. How much was that amount?

A. $30,300.00.

Q. Have you also examined the drawing accounts of the North Idaho Sales Company?

A. Yes, sir.

Q. How much of this total investment did you find withdrawn from the North Idaho Sales Company? A. $1,500.00.

Q. How was the remainder of the investment accounted for?

A. Through deposits of currency in the Idaho First National.

Q. Are these the deposits to which you have reference?

A. Yes, sir. I have checked these, and I have checked the records. [139]

Q. How much money did Mr. McFee put in the Dan Mac Lease in 1946? A. $21,250.00.

Q. How was this investment made?

A. Through deposits in the Idaho First National.

Q. Did you check the drawing account at the North Idaho Sales Company? A. Yes, sir.

Q. Did any of this investment come out of the North Idaho Sales Company? A. No, sir.

Q. And the investment in 1946, did you ever check against either this Exhibit No. 21 or the duplicates of those tickets?

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(Testimony of Ray F. Olsen.)

A. I checked against the duplicates.

Q. In whose possession were those duplicates?

A. John Matthews.

Q. You have Exhibits 1 and 2; would you turn to the attachments which relate to Schedule F, page two? A. Yes, I have it.

Q. The partnership section of the return, what partnerships are listed there,—which exhibit do you have now? A. I have Exhibit 1.

Q. Which partnerships are listed?

A. The Dan Murphy Lease and the Dan Mac Lease.

Q. Does your present testimony relate in any way to the Dan [140] Murphy Lease?

A. No, sir.

Q. Are these entirely different and separate ventures? A. They are separate.

Q. Have you examined the record of the Dan Murphy Lease? A. Yes, sir.

Q. Where did the investment in the Dan Murphy Lease come from?

A. The drawing account of the North Idaho Sales Company.

Mr. Patten: You may cross examine.

Cross Examination

Q. (By Mr. Purdy): The books of the North Idaho Sales Company and the income tax returns were correct as far as the records of the North Idaho Sales Company were concerned for the years 1945 and 1946?

(Testimony of Ray F. Olsen.)

A. The income as shown on the books and these returns?

Q. Yes. A. They agree.

Q. For those two years? A. Yes, sir.

Mr. Purdy: That is all.

Mr. Patten: That is all. [141]

FRED SCHWENK

Having heretofore been called as a witness and having been sworn testifies as follows:

Direct Examination

Q. (By Mr. Patten): You have previously told us your address? A. Yes, sir.

Q. What was your business during the years 1945 and 1946? A. Lumber business.

Q. What was the name of that lumber company?

A. Sonduck and Schwenk.

Q. Was this a corporation or a partnership?

A. A corporation from the spring of 1945.

Q. Who were the stockholders?

A. J. L. Sonduck, Sidney Sonduck and myself.

Q. What was your position in the company?

A. Director, secretary and treasurer.

Q. How was this corporation financed?

A. Through loans that Mr. Sonduck secured for the corporation.

Q. From whom did Mr. Sonduck secure those loans? A. From Mr. McFee.

Q. Would you tell us the first loan Mr. Sonduck obtained in 1945 if you know, from Mr. McFee?

A. I have a schedule here.

(Testimony of Fred Schwenk.)

Q. Would that refresh your memory, according to this it was on [142] 26th of January, 1945, for the amount of $4,500.00, on the 14th of February, $1,000.00, on March 10, $2,000.00, March 15, $2,-500.00; March 30, $1,000.00; April 17, $1,500.00; April 24, $500.00; May 25, $14,500.00.

Q. What is the total?

A. $27,500.00 at that time.

Q. What, if anything, happened about that time in reference to those loans, were they handled any differently after that?

A. As I understood there was a note and chattel mortgage given by Mr. Sonduck to Mr. McFee.

Q. Was that by the corporation or Mr. Sonduck?

A. Mr. Sonduck personally.

A. At that time there was a total of how much?

A. Well there was another loan of $2,500.00 on the 8th of June and the last total was $30,000.00.

Q. At that time something happened?

A. Yes, a chattel mortgage issued to Mr. McFee from Mr. Sonduck.

Q. And who else?

A. Just Mr. Sonduck, that was a personal obligation at that time.

Q. Now the next transaction?

A. On the 9th of June an additional $1,000.00 and several after that, but that is all a matter of record.

Q. Can you give the loans at that time?

A. On June 9th,——

(Testimony of Fred Schwenk.)

Q. ——Refresh your memory and give the dates and amounts.

A. The 9th of June, $5,000.00. [143]

The Court: Is this in 1946?

A. No. 1945,—June 27th, $1,500.00; July 7th $1,500.00; July 23, $1,000.00; July 28, $2,000.00; September 28, $1,000.00.

Q. Is that the last loan during 1945?

A. According to my recollection and the schedule that I have.

Q. What was the total of the loans in 1945?

A. As I have it, $39,613.06.

Q. What if anything transpired at that time?

A. Well I,—Shortly after that,—I don't know that I should say shortly thereafter but thereafter all of the obligations were consolidated in one amount, $42,000.00, a chattel mortgage by the corporation was given to Mr. McFee absolving Mr. Sonduck of his individual liability.

Q. Did the corporation borrow any funds from Mr. McFee during 1946?

A. According to this, there was just one loan of $1,500.00.

Q. Did Mr. Sonduck or the corporation make repayments on those loans in 1945 or 1946?

A. In 1946 there was approximately,—first in 1945 $1,000.00 repaid and in 1946 a little over $2,500.00.

Q. How was the $2,500.00 repaid during 1946?

A. Some material was sold to him by the cor-

(Testimony of Fred Schwenk.)

poration and worked on this and the transportation cost.

Q. No money?

A. Except the corporation advanced money for the material that was sold to McFee. [144]

Q. Is your memory that the corporation furnished building material to Mr. McFee?

A. That is right.

Q. The $1,000.00, that was cash?

A. Yes, a cash payment.

Q. In the course of your testimony you have referred to the paper in your hand, will you tell the jury what that is?

A. A schedule of all of the transactions between Mr. Sonduck and Mr. McFee and subsequently the corporation and McFee; all of the loans and all of the repayments up until the 29th of March, 1948.

Q. Have you ever discussed the figures on that paper with Mr. McFee?

A. No, but I have with his accountants.

Q. Did you and his accountants agree that they were correct? A. Yes, sir.

Mr. Patten: I believe that you may cross examine.

Mr. Purdy: No questions.

JOSEPH L. SONDUCK

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows: [145]

Direct Examination

Q. (By Mr. Wilson): Where do you reside?

A. East 10420 Empire Way, Spokane.

Q. How long have you lived in Spokane?

A. About 15 years off and on.

Q. Are you acquainted with the defendant, Mr. McFee? A. Yes, sir.

Q. How long have you known him?

A. About nine years.

Q. And you had some business dealings during that time? A. Yes, sir.

Q. Do you know him socially quite well also?

A. Yes, sir.

Q. During 1945 and 1946 did you borrow any money from Mr. McFee? A. I did.

Q. Do you recall the total amount?

A. I never kept it in my mind as to the different loan at different times but all told about $42,000.00.

Q. How much of that $42,000.00 did you get in 1944,—on my previous question did I ask if you borrowed in 1944, '45 and '46?

A. I believed that you mentioned '45 and '46.

Q. I intended to include '44,—how much of the $42,000.00 did you get in 1944?

A. None repaid in 1944, it was in the neighborhood of about $5,000.00, maybe more or less.

Mr. Emigh: That was in 1944? [146]

A. Yes.

(Testimony of Joseph L. Sonduck.)

Q. Then the difference between that figure and $42,000.00, that balance was in 1945 and 1946?

A. That is correct.

Q. You have been handed Plaintiff's Exhibit No. 37, marked for identification, this purports to be a photograph taken of some instrument, can you identify that? A. Yes, sir.

Q. Do you know where the original of that is?

A. The last I saw of the original was in Mr. McFee's office.

Q. Do you know from where the original came?

A. That was a statement made at the office of Mr. McFee as to the amount owing Mr. McFee, that was a mutual statement between us to arrive at the amount from the notes.

Q. The original was taken from McFee's books?

A. That is correct.

Q. You will notice the signature,—there are two on this document? A. Yes.

Q. Do you recognize them?

A. My signature is there.

Q. Anybody else? A. Mr. McFee.

Q. Did you see Mr. McFee sign that document?

A. Yes.

Mr. Wilson: I would like to offer this in evidence.

Mr. Purdy: We have no objection. [147]

The Court: It may be admitted.

Q. Now, during the years 1945 and 1946 when you received these loans from Mr. McFee how were they made, by check, or money,—currency?

(Testimony of Joseph L. Sonduck.)

A. Currency and some checks.

Q. In proportion how many checks and how much in currency?

A. I really could not tell.

Q. Could you tell by examining the exhibit?

A. That would not tell me anything.

Q. Can you give the Court and jury some estimate?

Mr. Purdy: We object to that, the witness has already said he cannot tell and this could be nothing but a guess. We object to it as a conclusion of the witness and not a matter of his own knowledge at this time.

The Court: Yes, I think possibly the way he answered before that it would be a guess. If he can tell how much he received in currency, he may answer.

Q. Can you tell about how much you received in currency?

A. Truthfully I cannot say how much I received in currency.

Q. When you did receive it in currency, what were the denominations of the bills?

A. Well, there would be some 50's, some 10's and 20's.

Q. Will you explain what these figures are on this exhibit?

Mr. Purdy: I think possibly the exhibit is the best evidence and I object to this. [148]

The Court: He may explain any figures that they want him to explain.

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(Testimony of Joseph L. Sonduck.)

A. Well, here (indicating) in 1945 it says "balance brought forward $30,000.00" then it says "note due 7-15-45, $5,000.00," on June 27, 1945, note due $1,500.00, July 7, note due 8-7-45 $1,500.00, July 23 note due August 23, 1945, $1,000.00, July 28, note due August 28, 1945, $2,000.00; September 28, note due March 28, 1945, $1,000.00.

Q. Are those separate loans?

A. Yes, each a separate loan.

Q. How many loans are indicated on the exhibit during 1945 and 1946? A. Eight loans.

Q. Totalling how much as indicated on the exhibit? A. You want the grand total?

Q. Yes. A. $42,113.06.

Q. There are three smaller items?

A. Yes, sir.

Q. That is the amount you borrowed from Mr. McFee? A. Yes, sir.

Q. What is the date of that exhibit?

A. October 12, 1945.

Q. I am now referring to Exhibit No. 37 and it indicates here on January 4 note—Lewiston in the sum of $1,000.00, do you recall that? [149]

A. Yes, sir.

Q. Will you tell the Court about that?

A. Mr. McFee directed a club at Lewiston which he owned or had an interest in to pay me $1,000.00.

Q. How did you get that, who gave it to you?

A. The manager of the club gave me the money.

Q. In check or in cash? A. In cash.

Q. Was it currency? A. Yes, sir.

(Testimony of Joseph L. Sonduck.)

Q. There is marked on here "Deac-transfer" what does that mean?

A. Unless it is a transfer from Wallace to Spokane, I don't know.

Q. And that is in the sum of $1,000.00?

A. Yes.

Q. Who was Deac?

A. I don't know unless it was Dick Jones.

Q. How did you receive that money?

A. Transferred from Wallace to Spokane.

Q. There is also on this exhibit "Helen—12,20,44 $1,000.00," do you recall that?

A. No, I cannot recall that.

Q. Here is another, "Out of pocket 1-4 $500.00"?

A. Yes, I borrowed that from McFee.

Q. How did you receive that, was it a check or money? [150] A. I don't remember.

Q. Now, on February 14, 1945, note on demand, $1,000.00, do you recall that? A. No, I cannot.

Q. You have examined this exhibit?

A. Yes.

Q. Are the figures correct according to your knowledge? A. Yes, sir.

Q. That indicates the balance owing to Mr. McFee of $7,000.00 at that time, would you say that was correct?

A. No, I don't say that because I don't know.

Q. That is as of February 14, 1945?

A. If it is on the statement it must be so, everything was kept in the office, yes.

(Testimony of Joseph L. Sonduck.)

Q. March 10, 1945, note on demand $2,000.00, do you recall that?

A. It must be so, it is on the record.

Q. Do you recall how you received that?

A. No, I cannot recall.

Q. How did you happen to get this money, did you call him on the telephone?

A. I would make a trip to Wallace or call him on the 'phone.

Q. And where did you meet him when you made the trip to Wallace? A. At his office.

Q. Where did Mr. McFee get the money to give you? A. I don't know. [151]

Q. You didn't notice that? A. No, sir.

Q. Would you go to the bank?

A. At times he would go to the bank and at times he had it in the safe.

Q. Do you recall meeting him at a tavern in Wallace and getting some money from him in a tavern there in Wallace?

A. No, I don't recall that.

Q. And now, on March 15, 1945, this record shows note, on demand, $2,500.00, do you recall that?

A. Is it on the copy?

Q. I am reading from the copy to you.

A. Yes, sir.

Q. This indicates that you owe a balance of $11,500.00, you don't recall that?

A. No, I don't recall that.

The Court: You say that you don't remember whether you received $2,000.00 in cash or in a

(Testimony of Joseph L. Sonduck.)

check or how you got it. Now, I want you to tell counsel and the Court what you remember. You don't remember whether you received $2,000.00 in currency or a check? A. No, I cannot say.

The Court: Very well, you may proceed with your examination.

Q. Now, follow me on the left side again the word "Deac transfer," [152] $1,500.00, it says "given Deac for transfer?"

A. I cannot recall but it must be a transfer from Wallace to our bank in Spokane.

Q. Do you recall how it was made, whether you went to the bank with Mr. McFee or how?

A. It appears to me that I called him and he transferred that amount.

Q. On April 24, cash $500.00 do you recall obtaining that money from Mr. McFee, do you see it there? A. Yes I see it, April 27.

Q. No—April 24, do you recall that?

A. Yes, I do.

Q. Where were you at that time?

A. I cannot recall where that transaction took place.

Q. Do you recall how you received payment?

A. Yes, I think I do.

Q. How was that? A. In cash,—currency.

Q. Took it out of his pocket and handed it to you? A. That is right, yes, sir.

Q. Now, the next is May 5, and the figure is $14,500.00? A. That is right.

Q. Where did you negotiate that loan?

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(Testimony of Joseph L. Sonduck.)

A. In McFee's office.

Q. How did you receive payment at that time?

A. Currency. [153]

Q. Cash?

A. Yes, sir, that was paid in currency.

Q. What was the denomination of those bills?

A. They were various denominations, $50's, 20's and 10's.

Q. What would you say most of them were?

A. I cannot say.

Q. The next item indicates it was on June 4, it says "cash—Lewiston $100.00," do you recall that? A. Yes, sir.

Q. Where were you at that time?

A. We were at Lewiston.

Q. Did you give any security or collateral?

A. Yes, sir.

Q. What? A. Notes.

Q. Unsecured?

A. They were later secured by a mortgage.

Q. June 5, cash,—Lewiston, $500.00 now that seems to be the next day, do you recall that?

A. I don't recall the time and the place but I know it has been paid, that is we got it.

Q. Was it at the club?

A. I don't remember.

Q. Now, the next one indicates that it was on June 8th, that was cash at Wallace, Idaho, according to this record, $400.00?

A. It appears that these items were taken in these small amounts [154] and were later incor-

(Testimony of Joseph L. Sonduck.)

porated into one note of a $1,000.00 that would make $1,000.00.

Q. Did you have any money from Mr. Sherman at the Foresters Club in Wallace? A. No.

Q. I mean the Foresters Club in Coeur d'Alene?

A. Yes.

Q. Can you identify those items as being received from Sherman? A. No, I cannot.

Q. How did it happen that you received money from Sherman at Coeur d'Alene?

A. Mr. McFee instructed Sherman to give me the money.

Q. How was that money given to you?

A. In currency.

Q. The next item is under date of June 9th and is in the sum of $5,000.00, can you recall that incident? A. I recall the incident.

Q. Did you receive check or cash?

A. I would not say whether it was all or a part cash.

Q. Do you remember where it was that you received it?

A. Those large loans were made at Wallace.

Q. Mr. McFee gave it to you personally?

A. I couldn't say about that.

Q. If he didn't then who was it?

A. It was with Mr. McFee's knowledge, I know, but it could be the bookeeper, lots of times I received money from the [155] bookkeeper.

Q. How did you receive it at that time from the bookkeeper, was it check or currency?

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(Testimony of Joseph L. Sonduck.)

A. Currency.

Q. It was always currency?

A. That is right.

Q. All of the money you received, you received in currency up to that time? A. Yes, sir.

Q. On July 7th a note indicating the sum of $1,500.00, do you recall that?

A. I don't recall the incident.

Q. The record indicates that the balance owed at that time was in the sum of approximately $38,000.00? A. Yes, sir.

Q. That is, the record shows the balance to be $38,000.00. A. Yes.

Q. The next item was on July 23rd, and that was in the amount of $1,000.00?

A. That is right.

Q. Do you recall where you were when you got that money and from whom you got it?

A. No, I can't.

Q. The next is on July 28th and the amount is $2,000.00? A. Yes, sir.

Q. Do you recall where you got that money?

A. That was at Wallace.

Q. Do you recall who gave it to you?

A. No.

Q. Was it in cash or by check?

A. I cannot say that either.

Q. The next item is September 28th, $1,000.00, do you recall anything about that?

A. I know it was borrowed but I cannot recall the particulars about the loan.

(Testimony of Joseph L. Sonduck.)

Q. I wonder if you could read from the exhibit and give us the balance at the beginning of the year 1945? A. Well, there is——

Q. ——I believe you said that it showed about $5,000.00 or I believe you said that was the balance that you owed at that time,—doesn't the exhibit show $2,500.00, there are two copies, I don't know which one you are referring to, if you will look at the third line on the first page?

A. Yes, I see it, I am a very poor bookkeeper.

Q. In other words, at the beginning of 1945 you owed only $2,500.00?

A. According to the record, that is right.

Q. And the record, of course, is correct?

A. Yes, sir.

Q. How much did you get from Mr. McFee in 1946 that is on that record?

A. I don't recall. [157]

Q. You have been shown another paper?

A. March 10, 1946, $1,500.00.

Q. Did you get any other money except that from Mr. McFee?

A. I cannot say, I don't remember.

Q. Did you get that $1,500.00?

A. Yes, sir.

Q. Will you read the balance that you have on Exhibit No. 37, for the total amount that owed McFee for the year 1945? A. $42,113.06.

Q. Now, did you ever repay this money to McFee? A. Yes.

Q. When?

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(Testimony of Joseph L. Sonduck.)

A. In 1948, I sold a piece of property and there was $20,000.00 or so applied on his account.

Q. Did you repay any money at all during 1945 or 1946?

A. I don't know, I didn't keep track of the office work, I was very little in the office.

Q. The date of Exhibit No. 37 is in October, that is what date? A. October 12, 1945.

Q. And nothing had been paid at that time?

A. No.

Q. Was anything paid between October 12, 1945, and December 31. A. I cannot say.

Q. I might hand you this to refresh your memory.

A. There is a check dated December 20, 1945, for $1,000.00. [158]

Q. Is that your check?

A. That is my signature.

Q. What was that for, what was the money used for?

A. It must have been,—let me see——

Q. ——Didn't you give it to Mr. McFee?

A. Well——

The Court: You are not a very willing witness, are you?

A. Well, yes I did.

The Court: You are not a very willing witness, you really didn't want to come and testify for the government.

A. That is what I am here for.

(Testimony of Joseph L. Sonduck.)

The Court: Did you come willingly, were you subpoenaed?

A. I was subpoenaed.

The Court: You are friendly with the defendant?

A. We are casual acquaintances.

The Court: You say that you had borrowed this amount, this large amount of money.

A. I will explain this, I spent all my time at the mill and I cannot recall the transactions.

The Court: You are trying to remember what took place, are you?

A. I am trying to remember.

The Court: You can't remember what you did with the $1,000.00, an item of that size?

A. I really can't, there is a check of $1,000.00 I cashed myself, [159] it has my endorsement but I have no recollection of it.

Q. Referring to Plaintiff's Exhibit No. 37, that long list of loans that you received; do you recall any of them that you received by check, can you pick anyone out and tell us you got that by check?

A. There was a transaction that Mr. Fee gave stock, that was incorporated in these notes, he gave 3,200 in stock to sell, I presume that he was short of money.

Q. You sold it and got the money?

A. Yes, sir.

Q. Outside of that can you now think of any time that you were paid by check?

A. Another instance we got a check through the mail from Wallace.

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(Testimony of Joseph L. Sonduck.)

Q. What year was that?

A. 1945 or 1946.

Mr. Wilson: I believe you may cross examine the witness.

Cross Examination

Q. (By Mr. Purdy): Where is your mill located? A. Located at Almond and Euclid.

Q. Do you have a mill in central Idaho? [160]

A. Yes, I did have.

Q. What year was it you had the mill in central Idaho? A. In 1944.

Q. It remained there through 1946?

A. Yes,—no, it was through 1945.

Q. Now, in regard to some of those loans you were getting from Mr. McFee, do you recall of having phoned him from Lewiston for money?

A. Yes.

Q. And at that time did he direct you to go to Lewiston and get it from the Foresters Club?

A. Yes, sir.

Q. And that happened on more than one occasion? A. On two occasions.

Mr. Purdy: That is all.

Mr. Wilson: That is all.

FRED SCHWENK

Recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Could you tell us when

(Testimony of Fred Schwenk.)

Sonduck and Schwenk Lumber Company [161] received the stock and sold it and received cash?

A. May I look at the schedule?

Q. You may.

A. It says 1948, I recall that it was in the Fall, early in the Fall of the year.

Q. Do you recall what that stock was?

A. Sunshine Consolidated.

Mr. Patten: You may cross examine.

Cross Examination

Q. (By Mr. Purdy): Did you say 1948?

A. Yes, sir.

Mr. Purdy: Then we ask the testimony concerning that be stricken; that does not come within the confines of the bill of particulars and it is not within the confines of the charge here.

The Court: The motion is denied.

Mr. Emigh: May that go to the testimony of the other witness concerning this transaction?

Mr. Patten: I simply called this witness to correct an error. It does not relate to the time involved here.

The Court: Then you don't care about this testimony?

Mr. Patten: No, your Honor.

The Court: Then it may be stricken. [162]

The Court: We will take a recess at this time for 15 minutes.

April 25, 1952, 11:15 a.m.

GEORGE McINTOSH

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Your name is George McIntosh? A. George P. McIntosh.

Q. Will you spell your last name?

A. M-c-I-n-t-o-s-h.

Q. Where do you live?

A. Spokane, Washington.

Q. What is your address?

A. My office is 417 Simmons Building.

Q. What is your business?

A. Certified Public Accountant.

Q. And are you familiar with the corporation known as the Sonduck-Schwenk Lumber Company?

A. Yes, sir.

Q. We requested you to bring certain records with you? [163] A. Yes, sir.

Q. And you have them?

A. Yes, sir, I have them in my brief case.

Q. Will you get them? A. Yes, sir.

Q. What is the book that you have in your hand which is marked as Plaintiff's Exhibit No. 38?

A. That is the general ledger of Sonduck and Schwenk Lumber Company.

Q. The last piece of paper, will you turn to the loans payable ledger sheet? A. Yes, sir.

Q. Is the piece of paper that you have in your

(Testimony of George McIntosh.)

hand a correct copy of the accounts payable ledger as it appears in the account of the corporation?

A. Yes, sir.

Mr. Patten: I would like to offer this piece of paper as Exhibit No. 38 with the opportunity given to counsel to compare it with the accounts.

The Court: Is there any objection to that?

Mr. Purdy: We have no objection.

The Court: Then it may be admitted.

Mr. Patten: The witness is submitted for cross examination.

Mr. Purdy: We have no cross examination at this time. [164]

CARL RODGERS

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you spell your name?

A. R-o-d-g-e-r-s.

Q. What is your business, Mr. Rodgers?

A. Treasury Agent,—Internal Revenue Agent.

Q. How long have you been so employed?

A. Since 1935.

Q. Do you know the defendant in this proceeding? A. Yes, sir.

Q. When did you meet Mr. McFee?

A. I think it was in 1938, I was examining one of his tax returns.

Q. Can you place that date closer if you can?

(Testimony of Carl Rodgers.)

A. Well it was about January the 13th, 1938.

Q. Where did you meet him?

A. In his place of business in Wallace.

Q. In what connection did you meet Mr. McFee?

A. In connection with the examination of his 1936 income tax return.

Q. Did you discuss any other returns at that time? [165] A. Not at that time.

Q. Was that an individual tax return of Mr. A. F. McFee?

A. It was, and also a partnership return.

Q. What partnership?

A. North Idaho Sales Company.

Q. Do you recall Mr. McIntosh, did Mr. McFee tell you when that partnership was organized?

A. My recollection is that he did; I questioned him about that and my recollection is that it was on January 1, 1936.

Q. And who were the partners?

A. Mr. McFee and Dorothy McFee, his daughter.

Q. Did Mr. McFee tell you with what capital they started this business?

A. Either Mr. McFee or his daughter, I don't recall which one it was but I did inquire as to the capital and the services contributed to this partnership.

Q. In the conversation that you mentioned with his daughter was Mr. McFee present at this conversation?

A. I don't think he was when I talked to his daughter.

Q. Will you tell us what Mr. McFee said in any conversation that you had with him?

(Testimony of Carl Rodgers.)

Mr. Purdy: We object to that as no time or persons present have been fixed.

The Court: You may fix the persons present.

A. At the time you were talking to Mr. McFee who else was present? [166]

A. I don't think any one else was present at that time, not that I recall.

Q. Did Mr. McFee tell you what capital he started this business with?

A. He did, as I recall.

Q. What was the amount of this capital investment?

A. I think it was about $700.00 or $800.00, it was less than $1,000.00.

Q. Did he tell you his daughter had any money in the business? A. Yes, he did.

Q. What was her interest?

A. It was the same as his, equal partners.

Q. And what was the total investment in the business?

A. It was less than $2,000.00,—it was around $1,500.00.

Q. Did you have with you the partnership return of A. F. McFee and Dorothy McFee?

A. Yes, I did.

Q. And did you have with you the individual return of A. F. McFee? A. Yes, sir.

Q. And both of those related to the calendar year 1936? A. Yes, sir.

Q. Will you tell the jury what income was reported on the partnership return?

(Testimony of Carl Rodgers.)

A. The total income reported on the partnership return for the year 1936, the net income, was $3,009.23. [167]

Q. Of what did that income consist?

A. It consisted of receipts from slot machines,—amusement devices, vending machines.

Q. Any other income on the partnership return?

A. There was an item listed as salary paid to Mr. McFee.

Q. And what was the amount of that?

A. That amount was $910.00.

Q. Where did he earn that salary?

A. At the Green Grocery at Kellogg, Idaho.

Q. And does the return tell from what date he was employed? A. The return didn't say.

Q. Did you ask Mr. McFee? A. I did.

Q. What did he tell you?

A. January 1, 1936, to July 1, 1936, at $35.00 a week.

Q. You mentioned that the total net income reported by the partnership of A. F. McFee and Dorothy McFee was $3,009.23; does that include the $900.00 or the $910.00 that you mentioned?

A. It does.

Q. What income was reported on the individual return of A. F. McFee?

A. He reported a total income of $1,504.62.

Q. What was the source of that income?

A. The North Idaho Sales Company.

Q. What portion of that was from that source? [168] A. All of it.

(Testimony of Carl Rodgers.)

Q. And the portion of Mr. McFee's report is what part of the total report by the North Idaho Sales Company? A. Exactly one-half.

Mr. Patten: I intend to proceed to another year at this time, I am wondering if the Could would rather have the cross examination as to this year?

The Court: No, you go right ahead.

Q. Did you meet Mr. McFee at a subsequent date? A. Yes, sir, I did.

Q. And what date was that?

A. That was about July 3, 1941.

Q. And in what connection did you meet him at that time?

A. That was in connection with an examination of the North Idaho Sales Company and A. F. McFee and Dorothy McFee income tax returns for the year 1939.

Q. Did you have the original tax returns of the North Idaho Sales Company in your possession at that time? A. Yes, sir, I did.

Q. What was the net income reported on that return? A. $18,362.27.

Q. Did you have the individual return of A. F. McFee? A. No, I did not.

Q. According to the partnership return, who were the partners of the North Idaho Sales Company, or was it entitled the North Idaho Sales Company? [169]

A. It was entitled A. F. McFee and Dorothy McFee Partnership.

(Testimony of Carl Rodgers.)

Q. How was the earnings shown on the partnership return distributed?

A. They were shown 50% to A. F. McFee and 50% to Dorothy McFee equally, divided.

Q. The first conversation with Mr. McFee did he tell what occupation he had or how he was employed at the Green Grocery? A. No, sir.

Mr. Patten: You may cross examine.

Cross Examination

Q. (By Mr. Purdy): Did you check his returns against his books?

A. I did for the year 1939.

Q. Did they correspond?

A. Yes, sir, they did.

Mr. Purdy: That is all.

Mr. Patten: Yes, that is all.

H. R. McINTYRE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows: [170]

Direct Examination

Q. (By Mr. Patten): Will you spell your name?

A. M-c-I-n-t-y-r-e.

Q. And what is your address?

A. 815 Garden, Coeur d'Alene, Idaho.

Q. What is your business?

A. Internal Revenue Agent.

Q. How long have you been such Internal Revenue Agent? A. 30 years.

(Testimony of H. R. McIntyre.)

Q. How long here in Coeur d'Alene?

A. Since 1926.

Q. Do you know the defendant in this proceeding? A. I do.

Q. Mr. A. F. McFee, sitting there at the table?

A. Yes, sir.

Q. When did you first meet Mr. McFee?

A. About 1939.

Q. In what connection did you meet him?

A. Making an examination of his income tax return.

Q. For what year did you make those examinations?

A. For 1937, 1938, 1940 and 1941.

Q. Did you have the original returns of A. F. McFee's for those years?

A. I did for 1937, also 1938 and 1940 but not 1941.

Q. You didn't have it for 1941?

A. No, sir.

Q. Did you have the original returns for the partnership sometimes [171] referred to or known as North Idaho Sales Company, composed of A. F. McFee and Dorothy McFee?

A. For those same years, you mean?

Q. Yes, did you have those returns for 1937?

A. Apparently not.

Q. Did you have the return for 1938?

A. No,—Yes, I did for 1938.

Q. And did you have the returns for 1940?

A. Yes, sir, and also for 1941.

(Testimony of H. R. McIntyre.)

Q. Mr. McIntyre, you stated that you had the individual return of A. F. McFee for the year 1937, what income is shown on that return?

A. $2,918.71.

Q. And what is the source of that?

A. I want to make a correction, he showed a loss of $81.29, I was on another figure when I gave you the answer.

Q. The figure shows on the return was what?

A. A loss of $81.29.

Q. From what business did the return of Mr. McFee figure this loss?

A. His partnership income with other deductions that did not show in detail.

Q. You didn't have the partnership return for the year 1937?

A. No, I don't think I did for 1937.

Q. Did you discuss the return with Mr. McFee?

A. Yes, sir. [172]

Q. Do you recall the date of that conversation?

A. Well, that was about April 22, 1939.

Q. Who else was present at that conversation, if anyone?

A. I don't know, but I think that Mr. Hoover had something to do with those returns; I am not sure that he was there at that time.

Q. Did Mr. McFee tell you the source of his income in 1937? A. No, sir.

Q. What did you get the information from?

A. We picked it up from the books.

Q. Did you examine the books of the North

(Testimony of H. R. McIntyre.)

Idaho Sales Company for the year 1937?

A. Yes, and whatever data was available.

Q. What income was shown on the books of the North Idaho Sales Company for 1937, if any?

A. Not having that partnership return I cannot tell you. Not having it to refresh my memory, I cannot tell for that year.

Q. Did you make any adjustment for that year?

A. Yes, sir.

Q. On what basis did you make this adjustment?

A. From data that I discovered at the time of the examination.

Q. And what was that data?

A. Records in his office.

Q. Were those records of individual earnings?

A. We checked with the partnership and found that they coincided and we made no change or adjustment, the only adjustment [173] was to his personal income.

Q. And what was his personal income as shown on the return? A. One-half of that return.

Q. And what was the income figure?

A. $81.29.

Q. Profit or loss? A. Loss.

Q. Referring to the year 1938, did you have the A. F. McFee individual return with you at that time? A. Yes, sir.

Q. Did you have the individual returns consisting of the partnership of A. F. McFee and Dorothy McFee? A. Yes, sir.

Q. Can you tell us what the income was re-

(Testimony of H. R. McIntyre.)

ported on the return of A. F. McFee?

A. Yes, $3,171.80.

Q. And what was the income on the original return of the partnership? A. $6,343.60.

Q. Now, referring to the year 1940, at the time that you contacted Mr. McFee, did you have the original returns for the year 1940? A. I did.

Q. And what income was reported on the individual return of Mr. McFee for the year 1940?

A. $11,986.52. [174]

Q. What income was reported on the original return of the partnership composed of A. F. McFee and Dorothy McFee? A. $36,207.51.

Q. Is that the figure which was reported on the original return, will you look at that please?

A. No. It is not, it was $23,973.04.

Q. Now, referring to the year 1941, did you have the original return for the partnership for that year? A. Yes, I did.

Q. And what was the return on the partnership, —what was the income of the partnership as shown on this return? A. $20,468.87.

Q. Does that show how that income was distributed? A. Yes, sir.

Q. How was it distributed?

A. 50-50, to A. F. McFee and Dorothy McFee.

Q. And what figure would that make as Mr. McFee's income?

A. It was one-half of that amount.

Q. And did the return show the breakdown?

A. Yes, sir.

(Testimony of H. R. McIntyre.)

Q. You did make notes and you know that it was one-half? A. Yes, sir.

Q. Did you discuss with Mr. McFee the validity of this partnership? A. Yes, sir.

Q. And what did he tell you? [175]

A. We discussed it in a general way and we held that it was a partnership.

Q. What did he tell you regarding the capital contribution of the respective parties?

A. I don't think that we discussed that angle, although the books did show what they did put in.

Q. And was it equally divided between the two parties? A. Yes, sir.

Mr. Patten: You may cross examine the witness.

Cross Examination

Q. (By Mr. Purdy): In all the income tax investigations that you personally made and the examination that you had or conducted with Mr. McFee, or any of his organizations, I will ask you whether Mr. McFee's books and tax returns coincided?

A. Yes, sir.

Q. You have been in the service a long time?

A. Yes, sir.

Q. Is a person required to show anything other than the income for the specific year reported in making out returns, and the expenses for that specific or particular year? A. No, sir.

Q. Then if he had other monies that was not income, it would not show on that return? [176]

A. No, sir, it would not.

Mr. Purdy: That is all.

Mr. Patten: That is all.

HAROLD MASTERSON

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Will you spell your last name? A. M-a-s-t-e-r-s-o-n.

Q. Where do you live, Mr. Masterson?

A. Wallace, Idaho, 601 Pearl.

Q. And how long have you lived in Wallace?

A. 30 years, approximately, I don't know the exact date.

Q. Do you know the defendant in this proceeding? A. Certainly.

Q. Do you know him very well?

A. Why sure.

Q. Has that acquaintance been casual or intimate? A. Intimate all during that time.

Q. When did you first meet him?

A. In Spokane.

Q. When did you first meet him, what year was that? [177] A. 1929.

Q. Were you closely associated with Mr. McFee at that time? A. No, not at that time.

Q. When did you become closely associated with him? A. When I went to work for him.

Q. When was that? A. In 1929.

Q. What were you doing?

A. I went to work on the machines.

(Testimony of Harold Masterson.)

Q. What kind of machines? A. Slots.

Q. Where? A. All over.

Q. In Spokane? A. Some.

Q. How long were you employed by Mr. McFee at that time? A. Maybe five years.

Q. Was your acquaintanceship interrupted then?

A. Yes, sir.

Q. And when did you next see Mr. McFee.

A. About 1934.

Q. Where was that? A. In Spokane.

Q. How long,—strike that please,—were you living in Spokane then? A. Yes, sir. [178]

Q. Was Mr. McFee living in Spokane then?

A. No, sir.

Q. When did you move to Wallace?

A. In 1934 or 1935, I don't recall the date.

Q. Where did you live in Wallace?

A. I lived at two places.

Q. Where did you first live at Wallace?

A. At the Samuals Hotel.

Q. Was Mr. McFee living there at that time?

A. Yes.

Q. What business was Mr. McFee in at that time? A. The slot machine business.

Q. And were you employed by him then?

A. Part time.

Q. What wages did he pay you?

A. Very little.

Q. Do you recall the exact amount?

A. $12.00.

Q. Was that $12 a week? A. $12 a week.

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(Testimony of Harold Masterson.)

Q. You stated that you lived in two places, where was the next, you mentioned the Samuals Hotel? A. We moved to 303 6th Street.

Q. You say we moved, who do you mean?

A. Mr. McFee and I.

Q. And what is that place? [179]

A. That was his building.

Q. Is that the cinder block building?

A. Of the North Idaho Sales Company.

Q. Why did you move?

A. We thought that the expenses were less—maybe he knew that I could cook.

Q. How much did they charge you for a room at the Samuals Hotel? A. $1.50 a day.

Q. Where did you have your meals?

A. Out until we moved.

Q. After you moved, where did you have your meals? A. I cooked them.

Q. Where did you live with reference to the building—the building you said was Mr. McFee's?

A. In the back room.

Q. How large was this room?

A. It was one room.

Q. Was the stove in that room?

A. Not that room, but in the building.

Q. Did Mr. McFee have other business besides the North Idaho Sales Company? A. Sure.

Q. What other business?

A. We run a bar.

Q. Did he have other employment at that time?

A. At one time he did. [180]

(Testimony of Harold Masterson.)

Q. What was that?

A. At the Green Grocery.

Q. Were you employed at the Green Grocery?

A. No, I don't know how to cut meat.

Q. Did you ever go there? A. Yes.

Q. Why did you go there?

A. To take him down.

Q. What time did you go down there?

A. At 5:30 in the morning.

Q. In the winter or the summer?

A. Partly in the winter and the summer.

Q. You stated that Mr. McFee paid you $12.00 or $12.50 a week, for how long was that your salary?

A. Until the later years. I got more money than that afterward.

Q. Did you always get your salary promptly?

A. Yes, that amount of money I think he could pay $12.00.

Q. When was the salary raised?

A. I would have to look that up.

Q. Was it within a few years?

A. When business picked up, there wasn't very much business at that time and he couldn't pay too much.

Q. Did you ever have to wait for your salary?

A. I don't recall that I had to wait very long.

Q. How were you paid your salary? [181]

A. I might have been paid cash at that time.

Q. Were you later paid by check?

A. Yes sir, always, later.

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(Testimony of Harold Masterson.)

Q. And did you always cash those checks?

A. Not always.

Q. What would happen with the checks?

A. Sometimes I would not cash them.

Q. And why wouldn't you cash them?

A. I knew the money wasn't there.

Q. How did you know it wasn't there?

A. They called me from the bank.

Q. You say that you cooked when you were living at the North Idaho Sales Company building?

A. Yes.

Q. How long did you cook?

A. Well, I cooked there until I moved out.

Q. Did you do the cooking all of the time?

A. No, not all of the time.

Q. Who did the cooking?

A. I got married.

Q. And your wife did the cooking for yourself and Mr. McFee? A. Yes, sir.

Q. How long did you and your wife and Mr. McFee live at the North Idaho Sales Company?

A. Not long after I got married.

Q. In reference to the years 1945 and 1946, what were your [182] duties?

A. Repairing slot machines and collecting.

Q. What territory did you have?

A. Everything we had, all the locations.

Q. Did you cover all of the locations?

A. Yes, sir.

Q. During 1945 and 1946 did you service all of Mr. McFee's machines?

(Testimony of Harold Masterson.)

A. No, not then, we had a bigger spread and we had more men.

Q. How many men did he have then?

A. I cannot recall how many, that of course, depends on what date you ask about.

Q. Generally, during the years 1945 and 1946.

A. We have 3 or 4 in Wallace, 2 or 3 in Coeur d' Alene, 1 at Lewiston and I think that covers it.

Q. And what was that total?

A. Eight men, approximately, sometimes it would be less.

Q. And sometimes more?

A. No, I don't think that we had any more.

Q. What area did you cover during those years?

A. One time I covered Spokane.

Q. In 1945 and 1946, those are the years I am inquiring about now.

A. I was located in Wallace.

Q. You didn't service machines outside of Wallace?

A. I had Shoshone County, that included Avery in Montana. [183]

Q. How many locations did you have to call on?

A. According to the books that I used, I used three or four books at least.

Q. What are those books?

A. They are collection books, 50 pages in each book and I used three or four in one week in making collections.

Q. What information did you put in the book?

A. I collected the money in the slot machines

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(Testimony of Harold Masterson.)

with the operator and they signed the slip and I checked the books in the office.

Q. What was on the slip?

A. It showed every machine that we had.

Q. What would be at the top of the page?

A. The location.

Q. If it were a certain restaurant or tavern?

A. Yes.

Q. And what other information was there?

A. The number of machines, what kind of a machine it was and the total of the take and the split.

Q. Would you indicate whether they were five cent, ten cent or twenty-five cent machines?

A. Yes.

Q. Well, go ahead and describe what else was on the page in the book.

A. The location and the signature.

Q. How many copies would you make of this document? [184] A. Two copies.

Q. What would you do with the first copy?

A. The first copy we kept.

Q. That is the collector? A. Yes.

Q. And the next copy? A. We kept that.

Q. And the third copy?

A. The location gets that.

Q. Would this book show the division of the funds between the location and the North Idaho Sales Company? A. Yes, sir.

Q. From your experience, what generally was the division? A. 50 per cent.

(Testimony of Harold Masterson.)

Q. 50 per cent went to the North Idaho Sales Company? A. Sure.

Q. During the year 1945 and also 1946, did you make such a slip for every location that you visited?

A. I had to.

Q. What did you do with those after you finished with the collection?

A. I checked in the books when the slips and the books were completed.

Q. To whom did you turn those books?

A. To the bookkeeper in the office.

Q. How many locations did you cover in Shoshone County, I think [185] you also said that you went to Montana, how many places did you visit?

A. In 1945 or 1946, in the latter part I would say 150 with phonographs and machines.

Q. 150 locations? A. Yes sir.

Q. What were those?

A. Well, they were taverns and restaurants—we couldn't put them in a home.

Q. How many machines in a location?

A. That would depend on the location.

Q. What was the maximum number in any single location in your area? A. In my area?

Q. Yes, in the area that you served.

A. They might average three.

Q. The maximum number?

A. Some of the locations we may have five machines but not in all of them.

Q. Based on your experience you would say the average is about three?

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(Testimony of Harold Masterson.)

A. I think so, usually two at least and sometimes three besides the phonographs.

Q. How many machines would that be that you serviced?

A. Well that depends on the time that you mean, they kept increasing all of the time. [186]

Q. How many machines, that is, the total, would you have to unlock and get into?

A. It would depend on the day that I collected.

Q. Sometimes you had to go to each machine?

A. Yes, sir.

Q. How many would that be?

A. How many machines?

Q. How many were in your total area?

A. Well sometimes I used four books and that would be close to 200.

The Court: I think we will recess at this time until 2:00 o'clock.

April 25, 1952, 2:00 p.m.

Mr. Patten: That is all I have of this witness, he will be submitted for cross-examination.

Cross-Examination

Q. (By Mr. Purdy): Mr. Masterson handing you Defendant's Exhibit No. 39, I will ask you if you know what that is?

A. That is the collection book that I used to make my collections.

Q. That is the book that you referred to this morning? [187]

(Testimony of Harold Masterson.)

A. That is my collection book, yes sir.

Q. Now, will you describe to the jury when you made those collections what use or purpose that book served?

A. I put down the location—there were carbons and a pencil copy, the carbon tissue and a carbon copy, the carbon copy I could not erase in between any of them, this shows the same copy as the location would get.

Q. Would the location get one copy?

A. Yes, sir.

Q. And what became of the others?

A. I took them.

Q. And they were turned into the office, I think you said? A. Yes, sir.

Mr. Purdy: We will offer that exhibit in evidence.

Mr. Patten: No objection.

The Court: It may be admitted.

Q. Just open that book to the first page—I will ask you if you see a number on the first page?

A. Yes, sir, the number of the page and the number of the book.

Q. That is the number of the book and the page?

A. Yes, sir.

Q. And do you find the same number on the second sheet?

A. There are two numbers here.

Q. I mean on the page, the slip?

A. Yes, the number of the page. [188]

(Testimony of Harold Masterson.)

Q. Now what you find on the next page, that would be the same?

A. There are three pages with the same page number.

Q. Would the same number appear on each of those three pages? A. Yes, sir.

Q. So that they would be identically the same?

A. Yes, sir.

Q. Were you working for the defendant McFee during the period of time in which Shoshone County built the fish hatchery? A. Yes, sir.

Q. Was Mr. McFee operating slot machines at that time? A. Not all of that time.

Q. During the period of time that they were raising money for the fish hatchery?

A. Yes, sir.

Q. And during the time they were raising the money for that hatchery what did you do with the money that you collected?

A. I had a man from the Coeur d' Alene Hardware Company with me and I would take the money from the slot machines and turn it over to the Hardware Company.

Q. And that was for the building of the hatchery? A. Yes, sir.

Q. Nothing was turned to Mr. McFee?

A. He didn't get any in any location.

Q. He never got any of the money?

A. I took it up to the Coeur d' Alene Hardware Company.

Q. What year was that? [189]

(Testimony of Harold Masterson.)

A. I have a record of it.

Q. Could you tell what year that was?

A. I don't recall the exact date, but I still have the record and I could find out.

Q. Mr. Masterson, how long a period did that run?

A. Ran quite a few months—quite a few weeks, I didn't mean months.

Q. For the district in which you were located, did I understand that you did all of the collecting?

A. In that district.

Q. And for each business or the money that you collected you had one of those slips?

A. Yes, sir.

Q. And the location also had a slip?

A. Yes, sir.

Q. Who deposited the money in the bank?

A. I did.

Q. Now, was there any method that you had to check the bank deposits with the slips?

A. Yes, sir.

Q. How would you do that?

A. I would put the number on the top of the bank slip that I was banking, the number of the book.

Q. And the bank balance, or slip, and the book would balance?

A. The deposit slip would balance with the book, I don't know about the bank balance. [190]

Q. But your book and the bank deposit would balance? A. They had to.

(Testimony of Harold Masterson.)

Q. Did you know Perry Magee?

A. Yes, sir.

Q. Was he employed by Mr. McFee?

A. Part time.

Q. Did you have trouble with him?

A. Yes, sir.

Q. What was that trouble?

A. I wouldn't turn the collections to him.

Q. He wanted you to turn the collections to him and him deposit them? A. Yes, sir.

Q. And you refused to do that?

A. Yes, sir.

Q. Mr. Masterson, did Mr. McFee travel quite extensively? A. At times.

Q. And would he be gone for a considerable period of time? A. Sometimes he would.

Q. Do you know of your own knowledge what he might have been doing during those times?

A. He didn't tell me.

Q. Do you have any idea what the fish hatchery cost?

A. I don't know; I know that it cost a lot of money but I didn't see the figure.

Q. Mr. Masterson, to your best recollection what were some of [191] the best years that you had in your collections?

A. Well, that depends on where I was collecting.

Q. Taking it as a whole, as to the year 1942, 1943, 1936 and 1937 and so on?

A. Well I collected a lot of years and I cannot recall which was the best, it didn't make much dif-

(Testimony of Harold Masterson.)

ference in one place, where I would collect at one place it didn't go up and down too much.

Mr. Purdy: That is all, thank you.

Mr. Patten: That is all.

DAN HANNAH

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Mr. Hannah, will you tell the jury where you live?

A. Wallace, Idaho.

Q. What do you do in Wallace?

A. Work in the bank.

Q. What bank?

A. The Idaho First National.

Q. Is that the bank O. L. Jones is connected with? A. He is the manager. [192]

Q. What is your position?

A. Assistant manager.

Q. We asked for certain records of the bank, do you have them with you? A. I do.

Q. Can you identify Plaintiff's Exhibit Number 40? A. Yes, sir, I can.

Q. Is it an official record of the bank?

A. Yes, sir.

Q. And that is a correct copy of the original which you have now? A. Yes, sir.

Q. Will you identify it more fully?

(Testimony of Dan Hannah.)

A. $5,000.00 in currency is the total amount of the deposit.

Q. Is that a deposit slip? A. Yes, sir.

Q. And what is the date of the deposit?

A. February 20, 1946.

Q. To whom?

Mr. Purdy: I would suggest that it be put in evidence before it is read.

Mr. Patten: I offer this in evidence.

Mr. Purdy: We have no objections.

The Court: It may be admitted and a copy will be introduced and the original returned to the witness.

Q. Whose account is that? [193]

A. A. F. McFee.

Q. And will you give the date?

A. February 20, 1946.

Q. What does the deposit slip show?

A. $5,000.00 cash,—currency, deposited to his account.

Q. You have been handed Plaintiff's Exhibit No. 41, can you identify that?

A. This is a card, a ledger card, loose-leaf ledger card that we use in connection with loans; it shows the debits, the credits and the balance carried forward.

Q. That is an official record of the bank?

A. This is the original record and only copy.

Mr. Patten: I would like to introduce Exhibit No. 41 in evidence.

(Testimony of Dan Hannah.)

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. By examining that card can you tell us whether or not the loans,—tell us first whose ledger card that is? A. Roger W. Greenough.

Q. Does that reflect the loans to Mr. Greenough during 1946?

A. I don't see that date here. Oh, yes, here it is; some of the later ones that had the date in one spot but here it is (indicating).

Q. What was the date of that loan?

A. It was dated,—the note was dated November 2, 1946. And put through our books November 4, 1946. [194]

Q. What is the amount of that loan?

A. $5,000.00.

Q. Now, you have been handed Plaintiff's Exhibit No. 42, will you please identify that?

A. That is the collateral record.

Q. It is an official record of the bank?

A. Yes, original, duplicate and triplicate.

Mr. Patten: I would like to offer Exhibit No. 42 in evidence.

Mr. Purdy: We have no objections.

The Court: It may be admitted.

Q. Mr. Hannah, will you tell the jury from this record what collateral was used to secure the loan to Mr. Greenough?

A. A $5,000.00 cashier's check drawn in favor of A. F. McFee on the Idaho First National Bank.

Q. You have been handed Plaintiff's Exhibit

(Testimony of Dan Hannah.)

No. 19, can you tell whether that is the cashier's check used as collateral for the loan to Mr. Greenough? A. It was.

Mr. Patten: I offer Exhibit No. 19 in evidence at this time.

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. Mr. Hannah, you have been handed Plaintiff's Exhibit No. 43, would you identify that please?

A. That is an order for United States Securities, a duplicate [195] of the order.

Q. Is that an official record of the bank?

A. Yes, sir.

Mr. Patten: I would like to offer Exhibit No. 43 in evidence.

Mr. Purdy: No objections.

The Court: It may be admitted.

Q. Would you identify that document?

A. This is for the purchase of $10,000.00 par value two and one-half per cent Treasury Bonds due in 1972, optional payment in 1967, the purchaser was A. F. McFee.

Q. And the date? A. June 18, 1945.

Q. Mr. Hannah, you have been handed Plaintiff's Exhibit No. 44 for identification, will you please identify that document for us.

A. That is our bank's collateral record.

Mr. Patten: I would like to offer Exhibit No. 44 in evidence.

Mr. Purdy: No objections.

The Court: It may be admitted.

(Testimony of Dan Hannah.)

Q. Now Mr. Hannah, would you look at Exhibit No. 44 and identify that more fully?

A. Well, there was a loan made in the bank,—this $10,000.00 of treasury two and one-half per cent bonds due 1972 the numbers being on this collateral record was put up as [196] to the loan.

Q. How much was the loan?

A. Presumably $10,000.00; we make loans on face value but I have nothing to show right here, this is only the collateral record.

Q. You have been handed Plaintiff's Exhibit No. 19,—I beg your pardon, I mean No. 16, can you look on Exhibit No. 16 and see if you recognize the loan to which the collateral record you just had relates?

A. Going by the date only I think it is loan No. 59.

Q. What was the date of that loan?

A. June 18, 1945.

Q. It is credited on June 18, 1945, as a bank loan of $10,000.00 to Mr. McFee.

A. Yes, sir.

Q. What was the date the government bond was purchased? A. June 18, 1945.

Q. From your experience tell us, are these transactions related?

A. I would say so due to the numbers I see on them.

Mr. Patten: You may cross examine the witness.

Cross Examination

Q. (By Mr. Purdy): Is there anything on the

(Testimony of Dan Hannah.)

deposit slip, Exhibit No. 40, that would identify the person who made the deposit? [197]

A. No, sir.

Mr. Purdy: That is all.

Redirect Examination

Q. (By Mr. Patten): That shows to whose account it was deposited? A. Yes, sir.

Q. And who is that person?

A. A. F. McFee.

Mr. Patten: That is all.

Mr. Purdy: That is all.

H. R. McINTYRE

Being recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): When you testified this morning you told us that you audited Mr. McFee's return for the year 1943 and the partnership returns for the North Idaho Sales Company for the years,—was that 1941 or 1937? A. Both.

Q. With respect to one of these years you stated that you did not have the original return of Mr. McFee as an individual, [198] which year was that?

A. 1941.

Q. Have you stated that you had audited the return of Mr. McFee for 1941?

A. We used as a basis the taxpayers return.

Q. Who furnished that?

A. It was in the taxpayer's file at the time we examined it.

(Testimony of H. R. McIntyre.)

Q. As a result of the use of that duplicate, that the taxpayer furnished you would you tell us what the income was on that return?

A. $9,587.00.

Q. For what year? A. 1941.

Q. That is the individual return of A. F. McFee?

A. Yes, sir.

Mr. Patten: You may examine.

Mr. Purdy: No questions.

RAY F. OLSEN

Recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): Mr. Olsen you have been previously sworn, you have given [199] your name, and address and qualification? A. Yes, sir.

Q. Have you examined the capital account of the North Idaho Sales Company? A. Yes, sir.

Q. For the years 1945 and 1946?

A. Yes, sir.

Q. Where were those books located?

A. In the office of the North Idaho Sales Company.

Q. Who furnished you those books?

A. Bill Emasio.

Q. Referring specifically to year 1945, would you tell the jury what was the capital in Mr. McFee's drawing account at the beginning of that year as shown from the books which you examined?

(Testimony of Ray F. Olsen.)

A. The capital account?

Q. The investment and capital, you have also examined the capital account? A. Yes, sir.

Q. Referring to the capital account, what was the balance at the beginning of the year 1945, January 1, 1945 of Mr. A. F. McFee?

A. $59,693.77.

Q. And what was the balance at the end of that year? A. $62,661.03.

Q. Would you explain to the jury the difference between those [200] two figures?

A. There was an increase in the capital account due to the profit to $66,947.03; the account was reduced by withdrawals of $63,979.77.

Q. Have you also examined the drawing account of A. F. McFee for the year 1945? A. Yes, sir.

Q. Will you explain to the jury the various items withdrawn out of that account?

A. This is 1945?

Q. Yes.

A. $25,511.00 withdrawn and deposited to the Murphy Lease.

Q. That is the Murphy Lease?

A. The Murphy Lease and then an item of $600.00 to Myron Anderson for a lot; $1,000.00 to the White Delf Mining Company stock, that was for mining company stock and Alice Geothe was paid $225.00 for 50 shares of Polaris Mining stock; Pennaluna Company was paid $4,375.00 for 10,000 shares ofPolaris stock; F. C. Keane, $1,000 for Lucky Friday Extension stock; Henry L Day for mining

(Testimony of Ray F. Olsen.)

claims $10,000; $8,500.00 paid the Rice Building; Idaho First National Bank was paid on January 2 $100.00 on note, February 1 $500.00 on note, February 5, $100.00 on note, February 28, $100.00 on note; March 21, $500.00 on note, May 24, $1,000.00; on December 27 Ruth Poska was given $5,000.00; the next is miscellaneous travel checks $2,400.00; [201] payment on insurance premiums $1,359.55; J. A. Peterson $872.52; Expenses of operating Arnet Building $872.52; real-estate taxes $846.65; miscellaneous charges $453.55 making a total of $64,943.27. Against that there was a credit of $963.50 or a total withdrawn of $63,979.77.

Q. Have you examined Mr. McFee's drawing account on the books of the Foresters Club at Lewiston? A. Yes, sir.

Q. How much was drawn out of that account during 1945?

A. Near the end of December $15,000.00.

Q. Do you know what those funds were used for?

A. Yes, that is I know those were in a check held at the end of the year.

Q. Have you examined Mr. McFee's drawing account from the Foresters Club at Coeur d 'Alene?

A. Yes, sir.

Q. For the same year? A. Yes, sir.

Q. What drawing did he make out of that club account during 1945? A. None.

Q. Have you examined Mr. McFee's drawing

(Testimony of Ray F. Olsen.)

account from the Gem and the Big Barn Club—is that one or two clubs?

A. One club I understand.

Q. Have you examined his drawings out of that club? A. Yes, sir. [202]

Q. What were those drawings, if any and my question goes to the year 1945? A. None.

Q. Did you examine Mr. McFee's drawing account of the Murphy Lease? A. Yes, sir.

Q. What drawings did he make, if any, out of that account during 1945?

A. The only withdrawal was the right-off of the account $10.00.

Q. Did you examine the drawing account of Mr. McFee in the Dan Mac Lease? A. Yes, sir.

Q. What if anything did he draw out of this account in 1945? A. None.

Q. Could you quickly total Mr. McFee's withdrawals during the year 1945 from all of the books of his operations?

A. $63,979.77, from the North Idaho Sales Company and $15,000.00 from the Foresters Club at Lewiston.

Q. And $10.00 from the Murphy Lease?

A. That was a $10.00 adjustment.

Q. Was that just an adjustment on the books?

A. It says, right-off, accounts receivable.

Q. Do the drawing accounts that you examined cover all of the business of Mr. McFee shown on his returns with the exception of rents and interest? A. Yes, sir. [203]

(Testimony of Ray F. Olsen.)

Q. Now, referring to the year 1946, what was Mr. McFee's capital account on the books of the North Idaho Sales Company on January 1, 1946?

A. $62,661.03.

Q. And what was the capital account on December 31, 1946? A. $106,541.74.

Q. Will you explain the adjustments which brought about this change?

A. There was a profit for the year 1946 of $84,461.42; an additional investment of $5,000.00 in February 1946; an additional investment of $1,200.00 in April 1946; an additional investment of $5,000.00 in June 1946, this $5,000.00 was withdrawn from A. F. McFee special account with the First National Bank of Wallace. An additional investment of $5,000.00 in July 1946 this was withdrawn from the A. F. McFee special account with the First National Bank of Wallace and there was withdrawn $56,830.71.

Q. Have you examined the drawing account on the books of the North Idaho Sales Company for the year 1946? A. Yes, sir.

Q. Will you tell the jury what you found on that date and tell them the nature of those drawings.

A. September 1946, $25,000.00 paid to William Stansfield for the Samuals Hotel contract and on the same date there was $5,500.00 paid to William Stansfield, there was invested in the Murphy Lease $21,900.00; $2,400.00 in personal items; [204] a total payment for insurance $1,328.60; state income tax

(Testimony of Ray F. Olsen.)

$1,472.75; an additional payment on the Samuals Hotel $630.15; $150.00 to the Golden Eagle Mining Company for stock; the next item was $1,580.48, miscellaneous expenditures. There were credits of $90.00 a refund at Athol and a refund by William Stansfield of $2,741.27 and miscellaneous credit of $300.00 leaving a total withdrawal of $56,830.71.

Q. Have you examined the books of the Foresters Club for Mr. McFee's withdrawals?

A. Yes, sir.

Q. And what amounts were withdawn through that account?

A. In July of 1946 $5,000.00 was withdrawn.

Q. Do you know the purpose of that?

A. That was invested in the North Idaho Sales Company.

Q. Was the Foresters Club at Coeur d' Alene in operation during 1946? A. No, sir.

Q. Was the Gem Club and the Big Barn in operation? A. Yes, sir.

Q. In 1946? A. Yes, sir.

Q. Did you examine the McFee drawing account for the Murphy Lease? A. Yes, sir.

Q. What was withdrawn through that account?

A. None.

Q. Did you examine the McFee drawing account on the books of the Dan Mac Lease?

A. Yes, sir.

Q. Will you tell the jury what funds were withdrawn if any from that account? A. None.

Q. In addition to examining the books of Mr.

(Testimony of Ray F. Olsen.)

McFee's enterprises have you examined his bank account? A. Yes, sir.

Q. Would you name those accounts which you examined and did your examination cover the years 1945 and 1946?

A. The bank account of the North Idaho Sales Company.

Q. And give us the names of those banks.

A. In the Idaho First National Bank of Wallace, the Idaho First National Bank of Coeur d' Alene, the Dan Mac Lease bank account in the Idaho First National Bank of Wallace, the Murphy Lease in the Idaho First National Bank of Wallace, and the Foresters Club bank account in the Idaho First National Bank in Coeur d' Alene.

Q. How about the Foresters Club in Lewiston?

A. No, sir.

Q. You have examined the drawing—may I withdraw that—you have Exhibits 27 and 28, what are those?

A. Exhibit Number 27 is the account of the North Idaho Sales Company in the Lewiston Branch of the First Security Bank [206] of Idaho.

Q. And what is Exhibit Number 28?

A. Exhibit Number 28 is the bank account of the Foresters Club care of the North Idaho Sales Company Desert Hotel Building, Coeur d' Alene, Idaho, A. F. McFee by M. Lucille Dolan.

Q. Have you an account of the Big Barn and Gem Club? A. No, sir.

(Testimony of Ray F. Olsen.)

Q. You have been handed Exhibit Number 25, will you tell us what that is?

A. Exhibit Number 25 is a transcript of the account of the Big Barn and Gem Club from January 1, 1945 to December 31, 1945 inclusive.

Q. You have been handed Exhibit Number 17. Will you tell the jury if the purchase of those checks have been charged to any of Mr. McFee's drawing accounts which you have examined?

A. No, sir, neither one of them.

Q Could you find corresponding withdrawals in any of the bank accounts that you examined?

A. No, sir.

Q. Will you examine the remaining bank accounts and see if you can find any corresponding withdrawals withdrawn from those accounts?

A. None on those dates.

Q. You are a certified public accountant? [207]

A. Yes, sir.

Q. Could an item such as that be withdrawn if the books of the business balanced, could the funds be withdrawn for the personal use of the proprietor from the bank accounts and not charged to his drawing account?

A. Withdrawn for personal use but not business purposes, no, his books would not balance.

Q. Then it is not really necessary to examine those accounts in detail?

A. Well, if the books—if you withdraw something from the bank account your books will be out of balance unless it is charged to some draw-

(Testimony of Ray F. Olsen.)

ing account or to business expense.

Q. And if it is personal expenses where would it be charged? A. In the drawing account.

Q. There is no corresponding withdrawals for the purchase of those checks?

A. No, there isn't.

Q. You are being handed Exhibit Number 18.

A. This is Number 19.

Q. Number 19, will you state whether or not the purchase of this cashier's chesk has been charged to any of Mr. McFee's drawing accounts?

A. No, sir.

Q. Was the purchase of Exhibit Number 19 made through any of the bank accounts that you examined? A. No, sir. [208]

Q. Would you examine the remaining bank accounts and tell us whether they have been charged to those accounts?

A. On November 6, 1946 there is a $5,000.00 check out of the Coeur d' Alene branch of the Idaho First National Bank charged to the Foresters Club but that was charged four days after this check was written so it is not probable that this was written out of this account.

Q. Was this drawn for this purpose on Mr. McFee's account or on the Foresters Club?

A. No, it was not.

Q. Handing you Exhibit Number 18, will you state whether or not the purchase of either of those checks was charged to Mr. McFee on either of the drawing accounts of his business? A. No, sir.

(Testimony of Ray F. Olsen.)

Q. Can you state whether the purchase of these checks, whether these checks were purchased from any funds coming from any of the bank accounts that referred to? A. They did not.

Q. Will you examine the remaining bank accounts and state if they were charged to those accounts? A. No, sir, they were not.

Q. Mr. Olsen, with respect to the year 1945 I believe that you stated you have examined the investment account in the Dan Mac Lease.

A. Yes, sir. [209]

Q. Will you tell the jury the amount of that investment, the amount Mr. McFee invested in the Dan Mac Lease in 1945? A. $30,300.00.

Q. Will you tell the jury what portion of this investment was made with funds out of drawing accounts?

A. One check deposited on February 1, 1945 for $1,000.00; a second check on February 23, for $500.00.

Q. What drawing accounts were those checks charged to?

A. The North Idaho Sales Company.

Q. Did you examine all of Mr. McFee's drawing accounts to see whether or not this capital investment could have come from other drawing accounts? A. I did.

Q. Did any of them come from other drawing accounts? A. No, sir.

Q. With reference to 1946 will you tell the jury the total amount Mr. McFee invested in the Dan Mac Lease?

(Testimony of Ray F. Olsen.)

A. $21,250.00.

Q. Did any of those funds come out of McFee's drawing accounts? A. No, sir.

Q. By referring to those bank accounts can you determine if any of those funds came out of the bank accounts?

A. They could not have come out of those bank accounts unless they were charged to something else, or as something else other than drawings. [210]

Q. What would have been the effect upon the reported income if they had been charged to something else other than drawings?

Mr. Emigh: We object to that as calling for a conclusion of the witness, let him state the facts.

The Court: He is here as an expert, he may answer.

A. It would have understated his income.

Q. Did Mr. McFee have a loan account on any of those businesses covered by these bank accounts that you hold in your hand?

A. What type of loan account do you mean?

Q. Did he have one?

A. You mean did he borrow money from the bank?

Q. Any money in the nature of loans would be in the nature of a drawing account.

A. Well, it would be possible due to organization——

Q. ——Mr. Olsen, do you know whether he had such an account with the Foresters Club here or at Lewiston?

(Testimony of Ray F. Olsen.)

A. The books indicate that there was a $10,000.00 note payable to the Foresters Club at Coeur d' Alene, that is shown on the books of the North Idaho Sales Company.

Q. That is the only loan?

A. That is the only loan.

Q. Can you explain that loan any further, what year is that?

A. It is shown on the liabilities as of December 1943 so it was sometime before that.

Q. And that is the only loan account? [211]

A. Yes, sir.

Q. Connected with the Foresters Club?

A. There are some little account receivables interchangeable but that is the only loan.

Q. You were—will you explain how that transfer deposit was handled on the books of the Foresters Club?

A. This item of $3,000.00 was an additional capital credit to the investment account of the Foresters Club at Lewiston.

Q. Was that addition of Mr. McFee's investment in the Foresters Club in Lewiston accounted for by the capital accounts in some other of his businesses?

A. The records that I have indicate that it did not, it was not accounted for.

Q. Are there any drawings on the McFee drawing account that could account for the deposit of the $2,500.00 in the Dakota National Bank of Fargo on January 26, 1946?

(Testimony of Ray F. Olsen.)

A. You say any withdrawals?

Q. Yes, that could account for the deposit of this amount in currency in the Dakota National Bank at Fargo on January 26, 1946?

A. I did not find such an item.

The Court: I think we will recess at this time until 10:00 on Monday morning April 28, and I will ask you ladies and gentlemen of the jury to meet me here at that time.

April 28, 1952, 10:00 o'clock a.m. [212]

Q. Mr. Olsen, shortly before we adjourned you told the jury that $5,000.00 was withdrawn from McFee's account at the Foresters Club Lewiston, Idaho in July of 1946 and that those funds were transferred to the North Idaho Sales Company?

A. Yes, I want to correct this, those were funds to J. A. Allen which cleared the bank in November 1946 and was used for the payment of some stock and did not get to the North Idaho Sales Company.

Q. When was this charged to the Foresters Club? A. November 1946.

Q. From your examination of Mr. McFee's drawing accounts in his various ventures have you prepared a schedule showing a summary of his drawings? A. Yes, sir.

Mr. Patten: I would like to have these marked as Exhibits 45 and 46 and I would like to offer them in evidence at this time.

Mr. Purdy: We have no objections.

(Testimony of Ray F. Olsen.)

The Court: They may be admitted, both of the exhibits.

Q. Mr. Olsen, I notice from the exhibits that during December 1945 Mr. McFee withdrw $15,000.00 from the Foresters Club at Lewiston—that was during 1945 according to this exhibit, now, from an examination of the record, that is his record, what was the disposition of those drawings?

A. The check was cancelled, cleared at the First National at Wallace and the funds were taken in cash and not redeposited in his own business ventures.

Q. When was this check cashed?

A. Right near the end of 1945, I don't remember the exact date but it was the last of 1945 or early in 1946.

Q. Could Mr. McFee had used this $15,000.00 for any of the otherwise unexplained expenditures during 1945? A. He could have.

Mr. Emigh: We object to that as a conclusion of the witness and ask that it be stricken.

The Court: He may answer where he obtained the figures from the books that he examined.

Q. Mr. Olsen you have been handed Exhibit Number 19?

A. That is a cashier's check number 125406 drawn on the Idaho First National Bank of Wallace, Idaho payable to A. F. McFee or ourselves, collateral receipt 120484 in the amount of $5,000.00.

Q. Is the purchase of this check charged to any of McFee's drawings or bank accounts?

(Testimony of Ray F. Olsen.)

A. No.

Q. Can you identify Exhibit Number 22 which has been handed to you?

A. A deposit slip, deposited with the Idaho First National Bank of Wallace and credited to J. A. Allen December 31, 1946, currency $10,000.00, check $10,000.00 a total of [214] $20,000.00.

Q. Will you tell the jury whether the payments of $10,000.00 is shown by McFee on any bank account? A. It is not.

Q. On Exhibit Number 33, can you identify that?

A. That is a record of the savings department Dakota National Bank, savings deposit of E. M. Stern number 3674, Fargo, North Dakota January 26, 1946 deposited currency $2,800.00 and $18.95 silver, a total of $2,818.95.

Q. Will you tell the jury if the deposit of $2,500.00 to the Stern account on this date can be explained by withdrawals by McFee or through any bank account?

Mr. Emigh: We object to that as calling for a conclusion of the witness and it evades the province of the jury.

The Court: How can it evade the province of this jury, I don't understand that, he may answer.

A. It was not a withdrawal from any of McFee's known businesses.

Q. Or bank accounts?

A. No, nor any bank accounts.

(Testimony of Ray F. Olsen.)

Q. Are any funds shown on McFee's books as going to Stern about this date?

A. One check drawn in February 1946 for $2,-170.00 which was charged to the purchasing account as liquor for the Foresters Club and that was charged to the purchase of liquor and couldn't have been this item because this is something else, purchase of liquor. [215]

Q. Tell the jury if the expenditure of $9,000.00 about March 21, 1946 by McFee in North Dakota can be accounted for by any withdrawals from McFee's accounts or any of his bank accounts?

A. It cannot.

Q. Will you identify Exhibit Number 37?

A. Yes.

Q. That was handed to you by the Bailiff?

A. It is a ledger account of J. L. Sonduck of Dickinson, North Dakota showing amounts of money loaned to Mr. Sonduck, according to this sheet it shows receivable, showing debits and balance.

Q. Did you see this record when you examined Mr. McFee's books? A. I did not.

Q. Have you ever seen the original of this record? A. No, sir.

Q. Can the loans on that record be accounted for by withdrawls from any of McFee's accounts, drawing accounts or bank accounts?

A. No, they cannot.

Q. You are handed Exhibit Number 38, can you tell the jury whether or not this shows any additional loans to Mr. Sonduck or to Sonduck and

(Testimony of Ray F. Olsen.)

Schwenk Lumber Company during 1946?

A. It shows loans or a loan and according to this sheet—— [216]

Q. ——Can those be accounted for by any withdrawals from Mr. McFee's drawing or bank accounts? A. It cannot.

Q. You are handed Exhibit Number 40, can you identify that?

A. It is a deposit slip with the Wallace Branch of the Idaho First National Bank for the credit of A. F. McFee, dated Wallace, Idaho February 20, 1946, currency $5,000.00, total of the deposit, $5,000.00.

Q. How was that transaction handled on the books of A. F. McFee?

A. It was credited to the investment account of the proprietor account of the North Idaho Sales Company.

Q. On the same date? A. February 1946.

Q. Will you tell the jury whether or not the additional investment in the North Idaho Sales Company can be accounted for by withdrawals though drawing accounts or bank accounts of A. F. McFee or any of his other businesses?

A. It cannot.

Mr. Emigh: We wish to enter an objection that it is calling for a conclusion of the witness and evading the province of the jury as the available funds from other sources than the books that he examined are not known to him and the statement that this investment cannot come from other funds

(Testimony of Ray F. Olsen.)

is rather speculative and evading the province of the jury and it is not limited to the confines [217] of the books that he is purported to have examined.

The Court: The objection is overruled; the witness is here as an expert, the witness examined the records, he is here as an investigator and an accountant, there is no other way the jury can get this information except from a witness as Mr. Olsen, the answer may stand.

Q. Will you tell the jury whether or not the drawing accounts of Mr. McFee or his various businesses or bank accounts—withdraw that please—will you tell the jury whether or not the drawing accounts with Mr. McFee and the various businesses or bank accounts show a loan to M. R. Arnold for $5,000.00 during 1945? A. They do not.

Q. Do the various bank accounts or drawing accounts of Mr. McFee in his various ventures or businesses show a loan of $4,000.00 to Mr. Arnold during 1946? A. They do not.

Q. You are handed Exhibit Number 16, will you identify that please?

A. It is a liability record of A. F. McFee showing loans, the dates the loans are made, date the loan was paid, collateral and endorsement, the date of payment, the maturity of the note, the rate of interest, the debits amount, the credit amount and the balance, it represents the loans—the loan account of the bank.

Q. Will you tell the jury how much Mr. McFee

(Testimony of Ray F. Olsen.)

borrowed from the [218] Idaho First National Bank during 1945? A. $37,500.00.

Q. From your examination of his records will you tell the jury what disposition was made of those borrowed funds?

A. $10,000.00, I believe that was in June was used to buy Government Bonds for $10,000.00 and the proceeds from the $27,500.00 shows as deposited in the books of the North Idaho Sales Company.

Q. Will you tell the jury according to the records how much Mr. McFee borrowed from the Idaho First National Bank of Wallace during the year of 1946? A. $20,000.00.

Q. From your examination of Mr. McFee's records will you tell the jury what disposition was made of those funds?

A. They went to the North Idaho Sales Company.

Q. Now, from your examination of this ledger will you tell the jury how much Mr. McFee repaid to the Idaho First National Bank in Wallace during 1945? A. Do you want the items separate?

Q. Just give the total items, just the total repayments. A. $13,589.13.

Q. Would you tell the jury which of those payments were accounted for by withdrawals from Mr. McFee's books or his bank accounts?

A. $5,800.00 were accounted for.

Q. Will you tell the jury what portion of those repayments [219] cannot be accounted for by withdrawals from the books and the bank accounts?

(Testimony of Ray F. Olsen.)

A. $7,789.13.

Q. Will you tell the jury from the examination of this ledger what repayments was made on these loans in 1946? A. $5,637.68.

Q. Were these payments accounted for by withdrawals from Mr. McFee's drawing accounts or bank accounts? A. No, sir.

Q. When did you first meet Mr. McFee?

A. I believe it was in May or early June 1947.

Q. Why did you meet him at that time?

A. To arrange to examine his income tax returns for 1942, 1943, 1944, 1945 and 1946.

Q. After the investigation had progressed awhile did you have a conversation with Mr. McFee?

A. I talked with Mr. McFee and Mr. Emasio in McFee's office along with Mr. Rice.

Q. What was the date of that conversation?

A. It was in the early part of 1948.

Q. Who is Mr. Rice?

A. He is a special agent for the Intelligence Unit.

Q. Is Mr. Emasio the gentleman who previously testified here in this case? A. Yes, sir.

Q. And did you place the date of that conversation? [220] A. It was early in 1948.

Q. What if anything did you say to Mr. McFee and what, if anything, did he say to you?

Mr. Emigh: We object to that for the reason that the date of the alleged conversation is not sufficiently identified and the further reason that any statement would be in the nature of an extra-ju-

(Testimony of Ray F. Olsen.)

dicial admission and not admissable at this time because the corpus delicti is not established.

The Court: He may answer.

A. We told him during the course of the examination that there were large expenditures and we could not determine their source and we wondered if he could explain where they came from.

Q. What did he say?

A. He thought part could have come from funds he had at the close of 1941.

Q. Did he mention the amount of funds that he estimated that he had on hand at that time?

A. He estimated that he had on hand at that time about $50,000.00 in cash.

Q. Did you discuss this matter with Mr. McFee at a later date? A. Yes, sir.

Q. When and where did this conversation take place?

A. In May or June in 1948, we went to his apartment in the Samuals Hotel to see if we couldn't account for some of [221] these large expenditures and went over all of the assets that we had or knew about that he had on hand showing what he owned; to see if we couldn't account for the large expenditures that we had not been able to account for.

Q. And what did you ask Mr. McFee.

Mr. Emigh: We will ask that the same obption be shown on the record, that this is in nature of an extra-judicial admission, it is incompetent on the ground

(Testimony of Ray F. Olsen.)

that the corpus delicti has not been shown.

The Court: And the record may show the same ruling.

Mr. Emigh: I wonder if the record may show that we have the same objections to this entire line of questions.

The Court: No, I don't believe that we should do that, you may make your objection. You may answer, Mr. Witness.

A. At this time Mr. McFee stated that he would try to produce some record and that he would prove what he had on hand at the end of 1941, he thought that he could produce the record to prove that he had on hand at that time $50,000.00 in cash.

Q. Did you discuss with Mr. McFee any other source from which this could have come?

A. We asked if he had any other source.

Q. And what did he say?

Mr. Emigh: We make the same objection.

The Court: The same ruling.

A. He said that he didn't. [222]

Q. And what steps did you take to determine any possible source of those funds?

A. We examined his books and records and also the Court records and the County records in Wallace, in Shoshone and also in Kootenai County and up at Sandpoint, in that County, we examined those records and also in Lewiston and in Moscow for any evidence of sales or any transactions which might have taken place which he might have forgotten about that could increase or account for some of

(Testimony of Ray F. Olsen.)

the expenditures that we were not able to account for, that would increase the income.

Q. And what would have been the effect if you had found that Mr. McFee had sold some property?

Mr. Emigh: We object to that as being entirely speculative.

A. Well if we could have found where he had sold some property that could have accounted for some of the funds that he had expended that we could not account for at that time.

Q. Did Mr. McFee ever furnish you any records with respect to this $50,000.00 that he told you that he had? A. No.

Q. Did you subsequently discuss that matter with McFee?

A. We talked with him after the conversation with him at the hotel and he said that he was going to Seattle.

Q. Where was that? A. That was in Wallace.

Q. Where in Wallace?

A. It was in front of the Idaho First National Bank.

Q. Was that the same day? A. Yes.

Q. What did he say?

Mr. Emigh: We object to that if it is for the purpose of introducing an admission by the defendant, it would be an extra-judicial or admission —the corpus delicti is not established and therefore any such statement as called for would be extra-judicial in character.

The Court: He may answer.

(Testimony of Ray F. Olsen.)

A. He was going to Seattle at that time and that he would get the records showing that he had this money on hand at the close of 1941.

Q. From your examination of Mr. McFee's returns and records and the exhibits introduced in this trial have you computed Mr. McFee's net income for 1945 and 1946? A. Yes, sir.

Q. How did you compute that?

A. First through unaccountable expenditures.

Q. Do you have that exhibit with you?

A. Yes, sir.

Mr. Patten: I will have this marked as Plaintiff's Exhibit Number 47 for identification and I will offer it in evidence at this time. [224]

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Mr. Patten: Your Honor, we have that exhibit copied on a blackboard and we request permission to bring it into the Courtroom so that it may be shown to the jury at this time.

Q. Have you computed Mr. McFee's income for the calendar year of 1946? A. Yes, sir.

Q. Do you have the computation with you?

A. Yes, sir.

Q. Will you hand it to the Bailiff so that it may be marked? A. Yes, sir.

Mr. Patten: I offer in evidence at this time, if the Court please, Exhibit Number 48.

Mr. Purdy: No objection.

The Court: It may be admitted.

Mr. Emigh: We think that it is irregular to have

(Testimony of Ray F. Olsen.)

this on the blackboard in front of the jury, we object to the proceedings; the exhibit is in evidence and may be examined by the jury if they desire; this is an attempt to substitute the exhibit on the blackboard for the one offered in evidence and to keep it before the jury.

The Court: I will permit the use of the blackboard for illustrative purposes and then it will be removed. Do you wish that the exhibit be handed to the jury? [225]

Mr. Patten: Yes, I would like that handed to the jury.

The Court: You may have that done.

Q. Can you tell the jury the source of the first figure on that exhibit?

A. That is net income shown on the income tax return, $25,166.67. That is the net income shown on the return.

Q. What is the next item?

A. This is a loan to Mr. Sonduck, or a number of loans, the figure is $39,613.06 which we could not determine the source that is we couldn't determine the source of the income from which those were paid or made.

Q. And the next item will you identify that or tell us what it is?

A. That is a $5,000.00 loan to M. R. Arnold which we couldn't determine.

Q. And the next, Mr. Olsen, what is that?

A. $28,800.00 investment in the Dan Mac Lease which we could not determine the source of.

(Testimony of Ray F. Olsen.)

Q. And the next item on the exhibit?

A. A payment of $7,789.13 which we couldn't determine the source of.

Q. And the next is the aggregate total?

A. Yes, sir, $81,202.19.

Q. You have subtracted certain items, what is the first?

A. $123.76 dividends which were not deposited in the bank and [226] could have been used to pay those items.

Q. Was that dividend reported on Mr. McFee's return? A. Yes, sir.

Q. And this last item that you subtracted?

A. Well that is an aggregate amount allowed of $1,167.20 for machines lost.

Q. Did Mr. McFee claim that on his return for the year?

A. There was some question about this and we allowed it.

Q. What was Mr. McFee's net income for the year 1945 according to your investigation which was taxable? A. $105,077.90.

Q. What income did he report?

A. $25,166.67.

Q. Now, will you turn to Exhibit Number 48, where did you obtain the first figure on that exhibit?

A. The amount shown on the income tax return, $39,769.01.

Q. And the next item?

(Testimony of Ray F. Olsen.)

A. That was a payment to E. M. Stern, $12,500.00.

Q. That was for the year 1946?

A. Yes, for the year 1946.

Q. And that is from undetermined sources?

A. Yes.

Q. And the next item?

A. That is $3,000.00, a cashier's check to W. F. Murphy.

Q. Will you go ahead with the items shown?

A. The next is a check deposited with E. M. Stern $2,500.00. [227] The next is a payment to the United States Court, Bismarck, North Dakota, of $7,500.00; the next is a payment to Mr. Stern for Francis Murphy, $1,500.00; the next item is a payment to J. A. Allen of $10,000.00; the next item is an investment in the Dan Mac Lease $21,250.00; the next item is an item of loans to Mr. Sonduck $1,500.00; payment, the next rather is a loan to M. R. Arnold $3,400.00; the next is a payment to the bank amounting to $5,637.68; the next is cashier's check number 125406 for $5,000.00; the next is a payment to the bank for cashier's check number 125175 in the name of A. F. McFee for $6,000.00; the next item is an additional investment in the North Idaho Sales Company $5,000.00; the next an investment in the Foresters Club in Lewiston, $3,000.00 making total payments of $87,787.68, these items were paid from sources that we can account for, not deposited in the bank which could have been used to make these payments; the next item on the exhibit

(Testimony of Ray F. Olsen.)

is $1,000.00 received from Sonduck at the close of 1945, carried in 1945; the next is $15,000.00 withdrawn from the Foresters Club at Lewiston which could have been used; the next item rents of $544.02; the next is loss of machines $473.90 making a total of expenditures which cannot be accounted $70,769.76.

Q. According to your computation what was Mr. McFee's net income for that year?

A. $110,448.77. [228]

Q. And what did he report on the tax return filed with the tax collector? A. $39,679.01.

Q. You obtained those figures from the exhibits here? A. Yes, sir.

Q. Have you computed Mr. McFee's net income for the years 1945 and 1946 by another method?

A. Yes, sir.

Q. What method is that?

A. By comparison of net worth.

Q. Will you explain to the jury what comparison of net worth is?

A. Comparison of net worth is to determine the net worth of an individual at the beginning of the year and the net worth of that individual at the close of the year and figure the increase during the year of course is accounted for by income.

Q. You do have those computations with you?

A. Yes, I have.

Q. Will you hand the net worth computations for the year 1945 to the Bailiff? A. Yes, sir.

(Testimony of Ray F. Olsen.)

Mr. Patten: I will ask that this be marked as Exhibit Number 49.

Q. Is that your computation?

A. That is correct. [229]

Q. Did you prepare this from figures you obtained from the same source that you mentioned that you made the other computation from?

A. Yes, sir.

Mr. Patten: We offer this in evidence at this time.

Mr. Purdy: We have no objection to that.

The Court: It may be admitted.

Q. Have you a similar computation of Mr. McFee's income for the year 1946?

A. Yes, I have.

Q. Do you have those computations with you?

A. Yes, sir.

Mr. Patten: I will ask that this be marked as Exhibit Number 50 and I offer it in evidence.

Mr. Purdy: We have no objection.

The Court: It may be admitted.

Q. Now Mr. Olsen, will you please step down here. According to your examination of the sources which you previously made, how much was Mr. McFee's net worth at the beginning of 1945?

A. $185,325.50.

Q. How much was he worth at the end of the year? A. $291,135.20.

Q. How much did this net worth increase?

A. $105,809.70.

Q. How much did he spend for purposes and

(Testimony of Ray F. Olsen.)

which do reflect on the accounts? [230]

A. $8,692.60 in personal items.

Q. Where did you get those figures?

A. From the drawing account.

Q. And what does that make his total increase in wealth, that year?

A. Well there is a little item, adjustments and that amounts to $152.82 making a total income of $114,654.48.

Q. Was all that taxable? A. No, sir.

Q. How much was not taxable?

A. $8,409.38, less the amount of $1,167.20.

Q. Making a taxable net income of how much?

A. $105,077.90.

Q. Does that agree with the result you reached in the expenditure computation? A. Yes, sir.

Q. What was Mr. McFee's net worth at the beginning of the year 1946 according to the computation you have now? A. $291,135.20.

Q. How much at the end of that year?

A. $373,236.81.

Q. What money did he spend which was not reflected in the increase in his wealth?

A. $4,818.48.

Q. Where did you get that figure?

A. Personal expenditures in the drawing account. [231]

Q. And the next item as shown on that exhibit?

A. $12,500.00 to E. M. Stern; $3,000.00 to W. F. Murphy; deposit with E. M. Stern $2,500.00; to the United States Court, Bismarck, North Dakota,

(Testimony of Ray F. Olsen.)

$7,500.00; to attorney Stern for Francis Murphy $1,500.00.

Q. What does that indicate the total income was for that year?

A. The total after adjustments of $2,203.27 leaves $111,716.82.

Q. Was all of that taxable? A. No.

Q. What was the amount not taxable?

A. $794.15 capital gain which was eliminated and $473.90 loss of machines.

Q. And what does your computation indicate was Mr. McFee's net income? A. $110,448.77.

Q. Does that agree with his income as computed by the expenditures method? A. Yes, it does.

Q. Without reading the figures just read the items which are included in McFee's net worth which are in those figures.

A. Checking account in the Wallace First National Bank; Stocks owned, mining and others; real estate, rental property; Government bonds; loans receivable; cashier's checks; Dan Murphy Lease investment and Dan Mac Lease investment; Foresters Club, Coeur d' Alene, investment account and contracts; Gem Club Athol investment; Samuals Hotel; [232] miscellaneous receivables, check of the Foresters Club at Lewiston, that is $15,000.00 not deposited; check from Sonduck $1,000.00 not deposited; investment in Foresters Club at Lewiston; North Idaho Sales Company investment account.

Q. How much does it show in property that McFee owned at the beginning and the end of 1945?

(Testimony of Ray F. Olsen.)

A. This is 1946.

Q. Yes, 1946.

A. At the beginning, $310,156.20.

Q. How much did he owe?

A. He owed, not identified on the books of the North Idaho Sales, $16,610.87 and investment for depreciation which reduced the assets $2,410.13, total liabilities and reserves $19,021.00.

Q. And what does that show his net worth at the beginning of the year? A. $291,135.20.

Q. And that is the figure that you have up there on the blackboard? A. That is one.

Q. And at the close of the year?

A. At the close of the year, what do you want?

Q. What did he own?

A. Including the investment in the Samuels Hotel he owned $388,425.13 against which there was a liabilities of $10,973.19, this was notes payable, and there was reserve [233] for depreciation $4,-215.13, a total of $15,188.32 or a net worth of $373,236.81; that is this figure here (indicating).

Q. Mr. Olsen, if Mr. McFee had reported a net income of $105,077.90 on his tax return which he filed for the year 1945 what would his income tax have been? A. $71,076.35.

Q. What income tax did he report?

A. $10,021.05.

Q. If Mr. McFee had reported an income of $110,448.77 on the income tax return he filed for the year 1946 what would his income tax have been?

A. $72,091.30.

(Testimony of Ray F. Olsen.)

Q. What income tax did he report?

A. $18,091.35.

Mr. Patten: You may cross-examine.

The Court: I think we will take a fifteen minute recess at this time.

April 28, 1952, 11:15 a.m.

Cross-Examination

Q. (By Mr. Emigh): How long have you been connected with the Internal Revenue Department?

A. 10 years, approximately.

Q. In what particular division?

A. Internal Revenue Agent in Charge.

Q. What are the duties of that department?

A. To examine tax returns and determine tax liability.

Q. Are you employed in what is known as the Technical Staff? A. No.

Q. When you testified that the expenditures in 1945 and 1946 were in excess of the income—of the reported income, you implied that those expenditures were paid out of taxable income.

A. That is correct.

Q. Now, Mr. Olsen, you don't know what they were paid out of, that is, as to whether it was money available—that is, to your knowledge money which was available at the beginning of the year 1945 or not.

A. We made an examination and we determined all of the income which was reported and all of the assets and it was determined that he had on hand

(Testimony of Ray F. Olsen.)

on January 1, 1945 all of the assets which he had at that time and then we determined whether he had known taxable income, inheritance, gifts and the like which could have accounted for those expenditures.

Q. You determined that from his books which have been put in evidence here?

A. We determined it from his books. [235]

Q. And the bank accounts which have been referred to?

A. That is correct, but not only from his books.

Q. I am asking again Mr. Olsen, if from your own knowledge outside of these opinions which you give, you had any knowledge from the books that you examined that he didn't have ample funds from other cash reserves to make these expenditures?

A. That is correct.

Q. You could not testify of your own knowledge could you? A. Yes, sir.

Q. How far back did you base your determination as to the net worth on January 1, 1945, how far back did you use his books to determine that?

A. 1931, December, '31.

Q. '31, how did you determine what he was worth on January 1, 1941?

A. Well, from the record and from his books, the Court records and county records which we could find throughout the country.

Q. And from what records or books?

A. The records of the North Idaho Sales Com-

(Testimony of Ray F. Olsen.)

pany and all records which have been available to us.

Q. The records referred to in Court which you testified to?

A. And any hearsay evidence that we could find which would establish that he might have had assets at the beginning of the year. [236]

Q. You had no cash statement from him as to any net worth on the first of the year 1941?

A. He didn't give us a statement, no sir.

Q. You had no statement that he had given to any bank at that time? A. No, sir.

Q. No statement of his assets that he had given anyone, nothing except the conclusion that you drew from these reports? A. That is correct.

Q. Your testimony a while ago was that your conclusion was based upon his known assets, that is, known to your department?

A. That is correct.

Q. Yesterday, or rather on Friday, in relation to exhibits numbered 17, 18 and 19 you testified that they were paid out of income. Will you examine those exhibits and tell what appears on them that would justify you in stating to this jury that they were paid out of income?

A. The first one, from the Wallace branch of the Idaho First National Bank, this is a cashier's check number 124697, that is Exhibit Number 17. There is no record in McFee's books in which he posted his income to indicate where this money came from.

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(Testimony of Ray F. Olsen.)

Q. There is nothing there to indicate where it came from? A. And he spent this. [237]

Q. You say it was not reflected in the books in which he posted his income tax returns.

A. That is right.

Q. It could have been from cash he had in reserve that was not reflected in the income tax report for the year in question?

A. The only source——

Q. ——Can you answer that question yes or no?

A. It could have come from income which he held.

Q. It could have come from income from earlier years or cash that he had at the beginning of this period upon which you base your examination.

A. There was no indication in January 31 or 41 that he had any cash on hand other than what McFee told us that he had.

Q. Just wait a minute, you have testified that you had no knowledge of what money that McFee had at the beginning of 1941.

A. Yes, we had what he told us.

Q. You had no record of his money or his worth except what he told you? A. That is correct.

Q. And these items, if there were any such funds, these could have been as well purchased or paid out of these funds as any others?

A. Yes, sir, that is correct.

Q. Do you have any knowledge that McFee had other funds besides [238] those reported on these income tax returns? A. No.

(Testimony of Ray F. Olsen.)

Q. Did you have any knowledge that he did not have other businesses? A. No, sir.

Q. All of these items of expenditures that you have testified about could have been paid out of money in his possession in 1941, could they not?

A. If he had sufficient money to pay them.

Q. At the beginning of that time?

A. Yes, sir.

Q. Were a number of Mr. McFee's businesses prior to 1945 partnership businesses?

A. A part of them were, yes.

Q. You have testified here as to all of the search that you made concerning moneys available to Mr. McFee at the beginning of 1945?

A. That is correct.

Q. The individual income would not be shown on the partnership returns—that is income outside of the partnership? A. It would not.

Q. As I understand it, any income return only shows the income for that current year, that is all that is required to be shown?

A. That is right.

Q. It does not have to show a financial statement of any kind [239] other than the receipts and disbursements of taxable money and disbursements?

A. That is right.

Q. You have mentioned a statement which you attribute to Mr. McFee about some $50,000.00 in cash? A. That is correct.

Q. And you are basing a part of your conclusion and your determination in this case on that state-

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(Testimony of Ray F. Olsen.)

ment are you not? A. That is right.

Q. Assuming that Mr. McFee had, prior to 1941 or prior to any other year, $200,000.00 not used in the businesses, would that reflect on his income tax return? A. No.

Mr. Emigh: I think that is all.

Redirect Examination

Q. (By Mr. Patten): You testified that you did not have a statement of Mr. McFee's cash condition as of January 1, 1942?

A. That is correct.

Q. Did you ask Mr. McFee for any such statement? A. Yes, we did.

Q. For 1942 or 1941 or any other year?

A. Yes, we did. [240]

Q. How many times did you ask for such a statement?

Mr. Emigh: We object to that as incompetent, irrelevant and immaterial, it is a right of the defendant not to disclose or to discuss those matters.

The Court: He may answer.

A. I only remember one specific time which was with Mr. Rice, we talked to him at other times but I don't remember in detail the conversations, we were not making an examination as revenue agents at that time and it is not the practice to make a statement of every detail of the conversation, all we are attempting to do is to determine their income.

Q. Did you ever receive such a statement from

(Testimony of Ray F. Olsen.)

Mr. McFee? A. No, sir.

Q. How much did you say Mr. McFee told you that he had at that time? A. $50,000.00.

Q. Then you assumed that Mr. McFee had this $50,000.00 on that date, could he have it on January 1, 1945? A. No, sir.

Q. Why?

A. Because he had unaccounted expenditures in 1943 and 1944 that would have used it up.

Mr. Patten: That is all.

Re-Cross-Examination [241]

Q. (By Mr. Emigh): But you are assuming that he didn't receive any other income in 1943 and 1944? A. I didn't find it.

Q. You cannot say that he didn't have it before that time? A. He didn't report it.

Q. You cannot say that he didn't receive it and not report it in those years?

A. We didn't find it.

Q. I think in relation to Exhibits 1 and 2 that you testified that it was reported—I believe that you read the tax item in place of the income item?

A. On which one?

Q. I will withdraw that question——

A. ——Under the income tax report of 1945 the income is reported as $25,166.67 and the tax liability is $10,021.05.

Q. And that is a correct statement as to what is on the exhibit? A. Yes, sir.

Q. Now will you read Exhibit Number 2, the same items?

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(Testimony of Ray F. Olsen.)

A. Net income $39,679.01 and the tax liability $18,091.35.

Q. Now, Mr. Olsen—withdraw that—and that is a correct statement as it appears on the exhibit?

A. That is the figure on the exhibit.

Q. Now, in your redirect examination you referred to a conversation with Mr. Rice being present? A. That is correct. [242]

Q. That is the only conversation you had or rather the only statement made by Mr. McFee?

A. That is right.

Q. You didn't request him to give a statement of his assets at that time? A. I did not.

Q. That request was not made in your presence?

A. I think Mr. Rice did that.

Q. Asked for a statement of all his assets?

A. Yes, sir.

Q. Was that when he referred to the $50,000.00?

A. Yes, sir.

Q. In your testimony a while ago you said that you just asked him to explain those expenditures?

A. That is what I did ask him.

Q. And he referred to the $50,000.00?

A. That is correct.

Mr. Emigh: I believe that is all.

The Court: How much cash or currency would Mr. McFee have to have on hand at the start of 1945 to make up the shortage that you found was unreported?

A. Approximately $150,000.00.

The Court: That is all I have.

Mr. Patten: At this I would like to offer in evidence Exhibits Number 6, 7, 10 and 20 previously identified in evidence here. [243]

The Court: They may be admitted.

CLIFFORD M. RICE

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Patten): What is your occupation —first Mr. Rice where do you live?

A. Spokane, Washington.

Q. What is the address?

A. South 3921 Lamont.

Q. And what is your occupation?

A. Special Agent, Internal Revenue Department.

Q. How long have you been employed by the Internal Revenue Department?

A. Since 1938, 13 and one-half years.

Q. What was your occupation prior to that time?

A. Public accountant for 3 and one half years.

Q. And before that?

A. I was an accountant in a hospital for nine years and a couple of years in banking, general ledger work.

Q. Do you know the defendant in this proceeding, Mr. McFee? A. Yes, sir.

Q. In what connection did you meet Mr. McFee?

A. In connection with the examination of the

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(Testimony of Clifford M. Rice.)

income tax returns for 1942 through 1946.

Q. When and where did you meet him?

A. As I recall it was on May 15 or 16 in his office at Wallace, Idaho.

Q. You say May 15 or 16, what year was that?

A. 1947.

Q. That was the time you met Mr. McFee?

A. Yes, sir.

Q. And what transpired at that time, and at that meeting?

A. I was there with Internal Revenue Agent Olsen who has just previously testified——

Q. ——I asked, Mr. Rice what transpired at the meeting?

A. Yes, we were there to make an investigation of his tax returns—Mr. McFee's tax returns for the years just mentioned. The books records had been made available in McFee's place of business, in the back end of the room; his bookkeeper, Miss Poska made the place available to us. On May 15 or 16, as I say Mr. McFee asked if we were being taken care of——

Mr. Emigh: That was brought out without a question and I object to it as an extra-judicial admission or a statement on the part of the defendant and at this time there is no sufficient proof of the corpus delicti for it, that is, that statement to be competent.

The Court: It seems to me that it is very unimportant, [245] however I think I will let it stand, the jury can decide if it is important or not. The

(Testimony of Clifford M. Rice.)

answer may stand, you may proceed.

Q. What records did Mr. McFee or his employe furnish to you?

A. The records of the North Idaho Sales Company, the general ledger was not there at that time, Mr. Emasio brought that over from his office and the cash journal was at the North Idaho Sales Company office and at the place they made available they consolidated those records for us to work with.

Q. Did Mr. McFee furnish you the route slips or the collection books of the collection on the slot machines? A. No, sir.

Q. Have you seen them since that time?

A. No, unless it was introduced here, I didn't examine that book.

Q. When was the next time you saw Mr. McFee?

A. It was in my office in Spokane on June 11, 1947, after I had asked him to come in.

Q. Any one else present at that meeting?

A. No, sir.

Q. And what did you say to Mr. McFee and what, if anything, did he say to you?

Mr. Emigh: May this conversation that is inquired about at this time and any statements made by the defendant McFee at that time be objected to for the reason upon the [246] ground that they are in the nature of extra-judicial statements or admissions and not competent to prove the corpus delicti and the corpus delicti is not proven as yet.

The Court: Any statements concerning 1946 or

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(Testimony of Clifford M. Rice.)

1947 or years prior you think are not admissible?

Mr. Emigh: I think that they would be and are in the nature of extra-judicial statements, if any were made by the defendant.

The Court: What do you mean by extra-judicial statements?

Mr. Emigh: Made outside of the Court proceeding——

The Court: ——It is your contention that no admission made by the defendant in connection with this kind of matter is admissible?

Mr. Emigh: I think they are not competent to establish the corpus delicti, the corpus delicti must be proven in other ways.

The Court: The objection is overruled.

Q. Now, going to conversation of June 11, 1947 will you tell us what was said at that conversation, what you said to Mr. McFee and what Mr. McFee said to you, if anything?

A. As is customary I advised him of his rights and I advised him as to the matter of self-incrimination. I discussed with him the matter of the large payments, told him of large payments that had come to my attention, particularly at St. Paul, Minnesota in 1944 and the large payments to [247] the United States Court at Bismarck, North Dakota in 1946 and the loans, I also mentioned the loans that were made allegedly to Mr. Sonduck, that had come to my knowledge in 1945 and 1946, that is, the loans were made at those times. I told him of two days that I had been in Wallace and

(Testimony of Clifford M. Rice.)

I had not found where those payments could be accounted for from the books of the North Idaho Sales Company and Mr. McFee told me at that time of the Foresters Club, he told me where those books were and also he mentioned the Gem Club and I asked him also at that time if he had a personal bank account and he said that he had a personal checking account at the First National Bank at Wallace. He said that I could check further on his other records. I told him that I would do that and that I would also check through his personal checking account.

Q. Did you check these records?

A. Yes, sir.

Q. Did you account for the large expenditures?

A. I did not.

Q. Where did you next meet Mr. McFee?

A. I believe it was on November 5, 1947. I was checking the personal bank account of Mr. McFee in Wallace and I analyzed that completely, both the deposits and the checks. A part of the work I did at the bank and in Mr. McFee's office. Mr. McFee was in at one time.

Q. Did you have any important conversation?

A. Well, not in connection with this matter, just passing remarks, something was said about Mr. Petrillo and other matters of that nature.

Q. What was the next conversation, if any, with Mr. McFee?

A. That was in February, February 16, 1948.

Q. Who was present and where was it?

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(Testimony of Clifford M. Rice.)

A. That was in Mr. Emasio's office in Wallace at about 2:00 p.m. on that day, that was by appointment made prior to that time.

Q. And who was present?

A. Mr. McFee, Mr. Emasio and Agent Olsen and myself.

Q. Will you tell the Court and jury what, if anything, Mr. McFee said to you at that conversation and what you said to him?

Mr. Emigh: We object to any statement made by Mr. McFee, that would be extra-judicial in character and not competent to prove the corpus delicti and it has not been established at this time.

The Court: He may answer.

A. Well again the purpose was to get at these large payments if we could, we had them confronting us and Revenue Agent Olsen and I talked to him and asked the source of the Sonduck loans in 1945 and 1946 also the large investments in the Dan Mac Lease in 1945 and the additional amount, not large, in 1946; we asked about the payment in the United States Court, the payment in St. Paul in 1944 and in [249] Bismarck in 1946 also another item at issue related to 1943. We could not account for something in excess of $100,000.00 which had been made for merchandise, as I recall the figure it was somewhere around $114,000.00 but I am not certain of that exact amount. Mr. McFee explained at that time that the money for the merchandise could be accounted for he believed through the Foresters Club at Lewiston and Coeur d'Alene.

(Testimony of Clifford M. Rice.)

Now, the other items he stated that he had approximately $50,000.00 at the beginning of the period that we had under investigation,—that is, at the beginning of the year 1942, from which the other payments could have been made.

The Court: We will recess at this time until 2:00 o'clock.

April 28, 1952, 2:00 o'clock p.m.

Q. I believe before the recess that you had finished the conversation that you had with the defendant and Mr. Emasio on February 16, 1948. Did you have any further conversations with Mr. McFee? A. Yes, June 14, 1948.

Q. Who was present at that conversation?

A. Mr. McFee, Internal Revenue Agent Olsen and myself. [250]

Q. And where was that?

A. That was in the hotel room, I think it was in my room I know I had driven in around noon and made an appointment with Mr. McFee.

Q. Which hotel was that?

A. The Samuals.

Q. What did you say to Mr. McFee and what if anything did Mr. McFee say to you at that conversation?

Mr. Emigh: That is objected to on the ground and for the reason that it manifestly calls for an extra-judicial statement or admission or confession.

The Court: There is no contention on your part that Mr. McFee was under arrest at that time or

(Testimony of Clifford M. Rice.)

any criminal proceedings had been started against him.

Mr. Emigh: If he was under investigation the same thing applies.

The Court: There is no contention that he was threatened with any arrest.

Mr. Emigh: Only that he was under investigation.

The Court: I understand that this witness advised him of his rights and that he was investigating that matter and that anything he said might be used against him.

Mr. Emigh: My position is the same as to the previous conversation that I objected to, as being an extra-judicial statement and it cannot be used to prove the corpus delicti.

The Court: I don't feel that this comes within the [251] rule of a person testifying against himself. You can cross examine the witness if you care to.

Mr. Emigh: I think the rule I have in mind provides for this objection.

The Court: If there is such a rule I think it is time I found it out. The jury will be excused for a moment.

(In the absence of the jury.)

Mr. Patten: If the rule is as counsel contends I am sure the corpus delicti has been proved at this time. We have proved the false return.

The Court: I think the objection will be over-

(Testimony of Clifford M. Rice.)

ruled and I will permit the witness to answer. The jury may be recalled.

(In the presence of the jury.)

Q. You may state the place and time of the conversation.

A. June 14, 1948, at the Samuals Hotel, Wallace, Idaho.

Q. Who was present?

A. Agent Olsen, Mr. McFee and myself.

Q. What did Mr. McFee say to you and what did you say to him?

A. I told Mr. McFee that as yet we had not been able to account for the large expenditures, that I had talked to him about before and I asked whether he might have received some inheritance in past years, prior to 1942 and he said that he hadn't. I asked if he had any source from which he could have made those payments and he said that he had cash before 1942. I asked him how it could be proved, that his [252] mere statement as I had told him we could not take just his statement, he told me that he didn't know just how he could prove it and I told him that the next best step would be his sworn statement which would be better than just a verbal statement and I asked him if he could give an affidavit or a sworn statement that he had this cash. He was still mentioning the $50,000.00 back in 1942. As I recall Mr. McFee said that he would consider that and as far as the conversation in the hotel room is concerned that

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(Testimony of Clifford M. Rice.)

I think is the substance of it. I did have a further conversation a few minutes later.

Q. Where was that?

A. That was in front of the Idaho First National Bank on the way over to the North Idaho Sales Company office. Mr. Olsen and I left the hotel immediately and went over to the office and met Mr. McFee in front of the Idaho First National Bank and Mr. McFee mentioned at that time——

Mr. Emigh: ——For the record we will object to this second statement in relation to what Mr. McFee said on the ground that it is in the nature of an extra-judicial statement and is not competent until the corpus delicti is proven by other competent evidence.

The Court: He may answer.

Q. What did Mr. McFee say to you and what did you say to him?

A. He said that he was leaving soon for Seattle, I think that afternoon and he asked whether I knew the man who ran the [253] Turf Club or he may have mentioned Mr. Churdsland and I said that I knew Mr. Oscar Churdsland and he said that Mr. Churdsland could tell me that he had large sums of money at the time that he said that is, prior to 1942. At that time Mr. McFee mentioned again the amount of $50,000.00 and he said that he didn't think that he could prove it himself but he thought that Mr. Churdsland could tell me that.

Q. Did you have any correspondence with Mr. McFee or did you see Mr. McFee later?

(Testimony of Clifford M. Rice.)

A. Yes, sir, about ten days later I saw him,—that was on June 14 that I just spoke of and I saw him again on June 24.

Q. Where was that?

A. At the Gem Cafe at Wallace.

Q. Who was present at that time?

A. Internal Agent Olsen and I were having lunch and Mr. McFee came to the cafe. I called him for an appointment before I got to town and we proceeded to the Samuals Hotel up to Mr. McFee's apartment in the hotel.

Q. And what was the conversation at that time?

Mr. Emigh: I make the same objection as I made to the preceding question.

The Court: The same ruling.

A. At that time in that room we sat down and opened up our papers and went over the various assets that had been of [254] record on the books of the North Idaho Sales Company, which had come out of those books after the partnership was dissolved. We went down all of the items one by one to determine whether he had those assets at the end of 1946. There were two items of stock that showed on the 1944 return, that showed that he had received $2,550.00 in proceeds from the sale of this stock. These two items were the only ones that Mr. McFee stated that he didn't have at the end of 1946. Mr. McFee stated that he talked to Mr. Churdsland that he could tell me that he knew that Mr. McFee had money prior to 1942,—prior to the beginning of 1942.

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(Testimony of Clifford M. Rice.)

Q. Is that the conversation at that time?

A. That is the substance of the conversation at that time.

Q. Did you have any correspondence with Mr. McFee later?

A. I wrote him a letter on September 8, 1948.

Q. Did you keep a copy of that letter?

A. Yes, sir, I have a copy of it.

Mr. Patten: I would like to have this marked as Plaintiff's Exhibit No. 51.

Q. Can you identify that document, Mr. Rice, Exhibit No. 51 which has been handed to you?

A. I mentioned September 8, 1948, this is September 7, 1948, it is dated at Spokane, Washington.

Q. Is that a copy of the letter that you referred to?

A. A copy of the letter directed to Mr. A. F. McFee, Wallace, [255] Idaho.

Q. What did you do with the original of that letter? A. I mailed it to Mr. McFee.

Q. Was it in a properly stamped envelope?

A. It was in a franked envelope of the Government, it was addressed to Mr. A. F. McFee, at Wallace, Idaho.

Q. And it was properly mailed, was it?

A. Yes, sir, it was.

Mr. Patten: We offer this in evidence at this time as Exhibit No. 51.

Mr. Emigh: To which we object first that it calls for an extra-judicial document, it is no proof of the corpus delicti and it is incompetent for that

(Testimony of Clifford M. Rice.)

purpose. We have no way of knowing what further use may be made of this exhibit and further it impinges on the right, the constitutional right of this defendant to make a statement which might incriminate him.

The Court: It may be admitted.

Mr. Patten: We request permission to read this to the jury at this time.

The Court: You may read it to the jury.

Mr. Patten:

"Spokane, Washington, September 7, 1948.

Mr. A. F. McFee

Wallace, Idaho [256]

In re: Income taxes

Dear Mr. McFee:

Sometime ago you advised Internal Revenue Agent Olsen and me that you wished to submit an affidavit in connection with the above entitled matter in order to place under oath certain of your statements to us relative to cash which you said you had on hand some years ago. We have not as yet received your affidavit nor heard anything from you relative thereto.

In view of the fact that we told you that such an affidavit, if submitted by you, would be incorporated into our reports on your case for whatever consideration could be given the statements made therein, it is desired that you advise as to whether you still wish to submit your affidavit in connection with such matter.

Please be advised that it is not compulsory that

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(Testimony of Clifford M. Rice.)

you submit such an affidavit, your submitting same must be entirely voluntary on your part. However, if you do wish to submit same to us and for certain reasons desire more time in which to prepare same or have it prepared, we will appreciate your advising as to the approximate amount of time you will yet need for its preparation.

Then there is the name Clifford M. Rice, Special Agent.

Q. Did you receive a response to that?

A. Yes, through Attorney Clayton Keane.

Q. Did you ever receive the statement referred to in the [257] letter? A. No, sir.

Q. Did you have any further conversations with Mr. McFee? A. Yes.

Q. When was the next conversation that you had? A. April 25, 1949.

Q. Where did that conversation occur and who was present?

A. Only Mr. McFee and I that was about one-half block from his place of business in Wallace, Idaho, at approximately noon on April 25th.

Q. What, if anything, did Mr. McFee say to you and what did you say to him?

Mr. Emigh: The same objection as was made to other like questions.

The Court: The same ruling.

A. I told Mr. McFee when I met him that I was just walking over to see him. When we met I told him that I understood that he was not going to give us a sworn statement; Mr. McFee's only

(Testimony of Clifford M. Rice.)

comment to me was that he said he probably should not do any more talking as it appeared that he was about to be indicted.

Q. You mentioned Mr. Oscar Churdsland?

A. Yes.

Q. Did you see Mr. Churdsland? A. Yes.

Q. When? [258]

A. August 21, 1948, at Seattle, Washington, in the Turf Club.

Q. Did he furnish you any information in regard to or did he direct you to any record relative to the amount of cash Mr. McFee had on hand at the close of 1941? A. He did not.

Q. Have you examined the books and records of Mr. McFee's enterprises? A. Yes, sir, I have.

Q. Particularly the books and records of the North Idaho Sales Company? A. Yes, sir.

Q. Have you examined the records which have been introduced in evidence here, as exhibits numbered 3 through to number 13,—Exhibit No. 3 is Mr. McFee's income tax return for the year 1942; Exhibit No. 4 is Mr. McFee's income tax return for the year '43; Exhibit No. 5 is the tax return for Mr. McFee for the year 1944; Exhibit No. 6 is the partnership tax return for the North Idaho Sales Company of Wallace, Idaho, for the year '42; 7 is the partnership tax return for the North Idaho Sales Company for the year '43; Exhibit No. 8 is the partnership tax return for the Dan Mac Lease for 1945; No. 9 is the partnership return for the Dan Mac Lease for the year '46; No. 10 is the

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(Testimony of Clifford M. Rice.)

certificate of assessment and payments made by A. F. McFee; No. 11 is the certificate of assessments and payments,—the same as No. 10, Exhibit [259] No. 12 is the same for Dorothy McFee; Exhibit No. 13 is the personal bank account of A. F. McFee at the First National Bank of Wallace, Idaho?

A. Yes, I have examined those.

Q. Do you know the amounts of income under the North Idaho Sales Company reports for 1936 through 1941? A. Yes, sir.

Q. On the basis of the reported income of Mr. McFee and the North Idaho Sales Company for the years 1936 through 1944 and on the basis of expenditures shown on the books, the bank accounts and the other accounts mentioned, have you computed the amounts of funds he could have had available to him on January 1, 1945, in addition to those shown in the businesses and the bank accounts?

Mr. Emigh: We object to that as it calls for a conclusion of the witness and for an opinion on matters not appearing in the exhibits as to income and expenses, tabulations and other items of a like nature.

The Court: He may answer.

A. Yes, sir.

Q. Do you have that exhibit with you?

A. Yes, sir.

Q. Plaintiff's Exhibit No. 52 is a computation which you have prepared from the sources which you have mentioned, is it? A. Yes, sir. [260]

(Testimony of Clifford M. Rice.)

Mr. Patten: We offer this in evidence at this time.

Mr. Emigh: We object to that as incompetent, irrelevant and immaterial and it is based in part on exhibits in Court which do not give the information upon which this conclusion is based.

The Court: I think I will admit the exhibit.

Q. Will you step down here and tell us what this first figure is? A. That is $2,000.00.

Q. And what is that?

A. That I used as the ultimate investment in the partnership beginning 1936.

Q. And the next figure, what is that?

A. That is the income reported 1936 through 1944.

Q. That is the total? A. Yes, sir.

Q. You say that is the income reported from 1936 through 1944? A. Yes, sir.

Q. Now, as I understand it from the years 1936 to 1943 the North Idaho Sales Company was a partnership in which Mr. A. F. McFee and his daughter Dorothy were equal partners?

A. Yes, sir.

Q. Are the figures which you used representative of the entire partnership earnings or Mr. McFee's one-half?

A. The entire partnership earnings. [261]

Q. And what is the next figure?

A. $342,178.98, the income reported plus the investment at the beginning.

Q. The next item?

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(Testimony of Clifford M. Rice.)

A. That figure, $166,440.46 is the investment in North Idaho Sales Company and other net worth of Mr. McFee at the end of the year 1944.

Q. The subtraction of the investment and net worth at the end from the figure which represents the earnings plus the investment gives you what?

A. $175,738.52.

Q. And what is that?

A. That is drawing from the business or the amount available for drawing.

Q. Is that the actual drawings from the business as taken from the books?

A. I didn't have the books to examine through from 1936 to 1941.

Q. Is that the maximum amount available?

A. That is the maximum amount.

Q. What are these figures (indicating) this list?

A. That is the personal and living expenditures from 1936 through 1944, income tax paid to the Federal Government and other items, the income tax paid to the Government is $135,714.64.

Q. Where did you obtain that figure? [262]

A. That is obtained from different sources through that period. For the period 1936 through 1941 there is included in there income tax payments which I took from the tax payments exhibits, those assessments and payments schedule in evidence here and the 1942 item of taxes which are included in that figure I took from the same place, the 1943 and 1944 figure I obtained these from the books of the North Idaho Sales Company and then I be-

(Testimony of Clifford M. Rice.)

lieve there was one or two payments that came out of his personal bank account.

Q. Now, the next figure?

A. That is income tax paid to the State, $8,276.34; this I obtained directly from the books of the North Idaho Sales Company, I don't recall that there was any of this payment out of the personal bank account.

Q. The next is titled insurance premiums paid.

A. Yes, $2,518.85 from the books of the North Idaho Sales Company, I don't recall that there were any of those payments out of the personal bank account.

Q. The next item?

A. That is $17,855.20 miscellaneous expenditures.

Q. Where did you obtain that?

A. In the year 1942 I obtained from the books the total amounts of his drawings from the North Idaho Sales Company and from those exhibits, assessments and payments of taxes, I eliminated this payment (indicating) and added the figure which I didn't total, from the books, that is, in the [263] miscellaneous figure there was $65,598.28 that is, of this total. For the year 1942 and for 1943 and '44 I completely analyzed the disbursements on the drawing on the books and I think there was a small bank charge of nine dollars and some odd cents that came out of the bank account.

Q. How long is the list of those items?

A. It is not extensive.

Q. Which makes a total of what?

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(Testimony of Clifford M. Rice.)

A. $17,855.20.

Q. This is the total figure?

A. Yes, there were checks to Dorothy McFee $4,060.00, these relate to 1943 and 1944; checks to A. F. McFee $4,800.00 those relate to the years 1943 and 1944; those checks were $200.00 per month or $2,400.00 in each year and then there were various living expenses, items on these records were totaled at $886.25; then there were a few checks on the drawing account that were unidentified as to purpose, one for $62.30 to the Pentulana Company, a check for $1,400.00 the name as I could read it Beandine, there was one or more checks grouped that went to Emil Plifter, $100.50, there were also various items, laundry and such as that amounting to $441.35, there was one item in there for $500.00 and that item was indicated on the books as a Federal fine. There were as I mentioned, back here in 1942,—I didn't break it down except as to taxes, payment of taxes and the $9.52 in 1944 in the bank account, charges [264] that were entered and itemized as $5,604.80, the books would show $5,595.98.

Q. The books show this total here (indicating)?

A. Yes, sir, $17,855.20, the books and the bank account.

Q. The next item on the exhibit $11,195.71 will you explain that?

A. For the years 1936 to 1941, that item is $11,195.71 that relates to those six years. I took the beginning investment for that period,—that

(Testimony of Clifford M. Rice.)

doesn't include 1942, '43 and '44,—the beginning investment and add to that profits of $77,994.73 and subtract from that the known investment at the end of the year 1941 and that would have left Mr. McFee and also his daughter $13,999.35 available to expend.

Q. For what?

A. Personal expenditures, personal drawings.

Q. To draw for what purpose?

A. For food and living expenses, now, the exhibit shows that $2,803.64 was spent for income taxes and that leaves $11,195.71 which could have been used for personal or living expenses, that is the item right here (indicating).

Q. By whom and for what years, you say that could have been used?

A. For the six years by Mr. McFee and his daughter.

Q. Did Mr. McFee and his daughter have any other sources of income shown on the return to use for living beside that amount?

A. Yes, $910.00 Mr. McFee had on his return for 1936, that [265] was the Green Grocery item for the period of June 1st to June 30th, 1936.

Q. And what is this last item on the exhibit?

A. $177.78, that relates entirely to the year 1944, drawing and payments out of the personal bank account.

Q. How much could Mr. McFee have had saved from his reported income for years 1936 to 1944?

A. He had available to him in addition to the

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(Testimony of Clifford M. Rice.)

funds in the business, this $17,855.20; there is the item of $2,800.00 in checks to Mr. McFee, those are regular $200.00 monthly checks, if he did save any of the amount of that money, if he had not spent all of this to live during 1936 to 1941, he would have the difference, that would have been available at the end of 1944.

Mr. Patten: I think you may cross examine.

Cross Examination

Q. (By Mr. Emigh): Mr. Rice, you made no personal investigation in 1936 as to the assets of Mr. McFee at the beginning of that year?

A. No, not definitely at that time.

Q. You didn't make any determination as to whether or not on January 1, 1936, he had other assets or other property available which did not appear on the books through the period that you have testified to? [266]

A. I talked to him regarding the resources and all questions that came up.

Q. I am speaking of your investigation in 1936?

A. My investigation,——

Q. ——Let me finish, I am speaking of your investigation in 1936 and not the statements which you have testified to since?

A. Through this determination I have, yes, sir.

Q. From those books that you have spoken of from which you made your determination, did you make any independent investigation to determine whether or not he had other assets than you found

(Testimony of Clifford M. Rice.)

on the books at the beginning of 1936?

A. I made some investigation through checking various records to see whether he sold anything during the period we are interested in.

Q. How far back did the records go?

A. We started with 1942.

Q. That is the only investigation that you made?

A. No, I talked to certain persons as to whether——

Q. ——Now, I don't want any hearsay I want your actual knowledge.

A. Independent investigation?

Q. Your knowledge, what you found.

Mr. Patten: You asked what investigation he made.

Mr. Emigh: He told us that he made the investigation starting in 1942. [267]

The Court: His investigation is what he is testifying to at this time, I understand that you are trying now to limit him. I think his investigation goes to everything concerning Mr. McFee of course, if you want to confine it to one particular item or one year I think probably you should do that and ask your questions on that.

Q. Did you ascertain,—you made no investigation in 1936? A. Not at that time, no.

Q. Not until 1942?

A. Our investigation started way up beyond 1942, that is we went beyond that, we started with the 1942 return.

Q. Did you determine from the investigation

(Testimony of Clifford M. Rice.)

that he had been engaged in business for some 15 or 20 years before 1936, or possibly 25 years?

A. I heard that.

Q. You didn't investigate that?

A. That was hearsay.

Q. Did you investigate to determine whether or not he had any assets in the way of bank accounts in 1936?

A. I found no bank accounts other than the one personal bank account in all of my investigation.

Q. Prior to 1942 what banks did you examine?

A. The First National Bank of Wallace for personal bank accounts.

Q. Did you have knowledge that he had been a resident of Spokane?

A. Not a resident, no. [268]

Q. Did you make any examination as to any assets in any Spokane bank? A. No.

Q. Did you make any investigation as to any assets in any Sandpoint bank?

A. There was an account of the North Idaho Sales in Sandpoint.

Q. You confined your investigation to these books and records identified in Court?

A. Not entirely, no, sir.

Q. And I believe you said investigation of the County records in 1942?

A. And forward to the end of 1947.

Q. Did you ascertain in this investigation that he had, during this period from 1936 to 1942 and

(Testimony of Clifford M. Rice.)

up to 1944 owned various pieces of property in this county, in Shoshone County and other counties in Northern Idaho?

A. I wasn't looking for that, I was looking for records of sales of property through 1942 to 1947.

Q. You were looking for sales?

A. Yes, sir.

Q. Did you make any investigation in the brokerage houses to determine whether he had any stock?

A. In the investigation of this matter, Mr. Olsen, I understand made that investigation.

Q. Did you make any? [269]

A. No, why should I duplicate his work?

Q. And you cannot state that he didn't have cash, stocks and bonds and also other valuable convertible property or valuables in the commencement of this period, the beginning of 1936 that you have not taken into consideration in this report?

A. From the investigation it appeared that he did not have any valuables at that time.

Q. Did you make any investigation as to these items, bonds, stocks and so on?

A. In questioning Mr. McFee, yes, sir.

Q. In asking Mr. McFee, that was the only investigation that you made as to properties of that kind prior to that period, is that true?

A. As to properties prior to that time.

Q. Yes, as to stocks, bonds, cash and other similar property which would be ready for conversion into cash.

A. I found no record of any sales during the

(Testimony of Clifford M. Rice.)

period that we were interested in, it didn't make any difference whether he had back there, in that time, and still had it, all that we were interested in was what he made in those years.

The Court: You have inquired about stocks and bonds, what bonds and stocks are you inquiring about, if there are any certain house or houses why can't you ask about that and get an answer from the witness.

Mr. Imigh: I think he has testified that he made no [270] such investigation, that he made no investigation at all of any brokerage house.

Q. That is right is it not Mr. Rice, you made no investigation of any brokerage houses?

A. That is right.

Q. You know that it is the practice in business to hold stocks where the certificates have been endorsed and delivered which would frequently not be recorded in the owners name, in the right ownership and later be sold?

A. Yes, I think that is right.

Q. Did you, in making up this net worth statement give credit for merchandise that had been purchased? A. During what period?

Q. During the period that you have testified about.

A. If he had it on hand it would be an asset, yes.

Q. Did you ever take an inventory of what he had on hand at the end of the period?

A. What period?

(Testimony of Clifford M. Rice.)

Q. The period that you have testified to, or any other period?

A. No, I wasn't there at that time.

Q. Well, let me ask, did you give him credit as an asset for any depletion or depreciation on his income tax during the period that you have examined?

A. Yes, those items are taken into consideration in his net income.

Q. Did you give him credit for depletion or depreciation in determining the net income? [271]

A. I don't understand where depletion comes in here.

Q. Where depletion appeared on the books did you give him credit for this depletion in determining the net worth?

A. Nothing other than what is on the return.

Q. The period from 1936 to 1942, you did not have all of his gross income? A. No, sir.

Q. It was just the net income?

A. That is right.

Q. And you did not know what items were taken out for depletion or what items were taken out for depreciation? A. That is right.

Q. You were estimating from the amount of taxes paid, what his income was from 1936 to 1942?

A. No, I am not.

Q. You cannot tell his gross income?

A. No.

Q. Then you are estimating his gross income from the taxes paid on it?

(Testimony of Clifford M. Rice.)

A. No, I didn't estimate the gross income at all, I dealt entirely with the net income.

Q. How did you determine the net income without having the gross?

A. From the amounts testified to by the Internal Revenue Agents in this court.

Q. You are taking the evidence of the other agents? [272]

A. This computation is built on evidence and other exhibits.

Q. You made this computation from other evidence?

A. Not entirely, the Revenue Agents testified from evidence that they had at the time of the examination, at the time that they examined these matters and that was in 1938, 1939, 1940, 1941, '42, '43 and '44,—Mr. Rodger McIntyre testified from this evidence.

Q. Did you give any credit for any sums,—any capital in the North Idaho Sales Company after the original $2,000.00 that was put in there in 1936?

A. No, sir.

Q. Did you know that there was no more money put in as capital from that time on?

A. I don't know.

Q. Then how can you determine the net worth when you have no basis to begin with?

A. From the information that I had available and from this computation.

Q. In that computation you didn't take into account any capital put in that concern after 1936?

(Testimony of Clifford M. Rice.)

A. That is right, if there was any.

Q. I think you stated that you didn't know of any physical assets that he had prior to 1936?

A. That is right.

Q. Do you know that he had no physical assets?

A. Not definitely. [273]

Q. You don't know what he might have had that are not reflected on these books, and do not have to be on there? A. That is right.

The Court: I think we will take a short recess at this time.

April 28, 1952, 3:30 o'clock p.m.

Q. Mr. Rice, your investigation in 1944,—no, I meant to say in 1942, you stated that you started your investigation and that investigation was in relation to the partnership in which Mr. McFee was a partner?

A. You mean my investigation of the year 1942?

Q. Yes.

A. Yes, that is right, and of course of his individual liability.

Q. You didn't have any individual books; the books were all partnership books?

A. Yes, sir.

Q. And the reports were partnership reports?

A. Well, he filed individual returns, those reported one-half of the partnership income.

Q. But it reflects the partnership income, or the business income. A. Yes. [274]

Q. And you have stated that you did give credit for assets on hand at the end of the year?

(Testimony of Clifford M. Rice.)

A. Which year?

Q. Well, for each year.

A. Indirectly all the way through that investigation, yes.

Q. You worked it out on a sheet of paper?

A. This computation shows the assets at the end of the year.

Q. Your computation shows just what amount was bought. You took no inventory, is that true?

A. The investment at the end of the period; his investment in the North Idaho Sales Company.

Q. And no other?

A. It is at the end of 1944.

Q. How about 1942?

A. His investment in the North Idaho Sales at that time, the partnership investment of $65,995.08, that is the figure that I used in the computation.

Q. At the end of 1943, what was the nature of the assets that you reported here for the jury,—in 1943? A. The end of 1943?

Q. Yes.

A. Investment in the North Idaho Sales Company.

Q. None other? A. That is right.

Q. You didn't give credit for the $114,000.00 merchandise not reflected in the books of the North Idaho Sales Company that [275] were purchased in the year 1943?

A. I understood that was sold.

Q. During what year? A. 1943.

Q. You just understood that? A. Yes, sir.

(Testimony of Clifford M. Rice.)

Q. You didn't give him credit for that merchandise I take it, at the end of 1943?

A. In talking to Mr. McFee in Mr. Emasio's office relative to these items he said that would probably be accounted for on the Foresters Club books; they related to the purchase of whiskey and liquor. There was 5 to 7 loads that we had evidence of, coming from the east, in talking to him he explained that was turnover.

Mr. Emigh: I think that is not responsive to the question.

The Court: I think it is, it may stand.

A. ——therefore, why should I give him credit for 113 or $114,000.00 when it was turnover. He purchased one load and then he sells that and purchases another load and takes that and tells it.

Q. Wasn't that item of $114,000.00 a single item?

A. No, it was evidenced by purchases.

Q. In 1943?

A. That is right, some of it cash, most of it, in fact all of it. It was paid in the East, St. Paul and Duluth. [276]

Q. What did you have at the end of 1942?

A. Investment in the North Idaho Sales Company.

Q. Were the assets of the North Idaho Sales Company augmented by $114,000.00 in 1943?

A. Not by my computation, I followed the books.

Q. They did not show this item?

A. For liquor sales, $114,000.00 for liquor sales.

Q. As expended? A. No.

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(Testimony of Clifford M. Rice.)

Q. $114,000.00 didn't show on the North Idaho Sales account as expended?

A. That is right, it was paid in cash.

Q. Paid in cash? A. That is right.

Mr. Emigh: I will ask that this document be handed to the witness.

Q. I will ask you if you recognize that signature, it is Exhibit No. 53.

A. I don't recall that I ever saw this.

Q. Do you recognize that signature?

A. P. H. Sherwood.

Q. You know who he is? A. Yes, sir.

Q. You were in the department in 1944?

A. Yes, sir.

Q. And you knew who he was then? [277]

A. That is right, this is right out of the office of the Commissioner of Internal Revenue, Washington, D. C., and it is signed P. H. Sherwood, head of the division.

Q. And it has the appearance of being genuine?

A. Oh, yes.

Mr. Emigh: We would like to offer this in evidence at this time.

Mr. Patten: No objection.

The Court: It may be admitted.

Mr. Emigh: I would like to read this to the jury.

The Court: You may do so.

Mr. Emigh: This is on the letterhead of the Treasury Department, Office of the Commissioner of Internal Revenue, Washington. "Certificate of

(Testimony of Clifford M. Rice.)

overpayment number 1830042 allowed $25,879.94 schedule number 107607." Addressed to

"A. F. McFee,
303 Sixth Street,
Wallace, Idaho.

Dear Mr. McFee:

The mathematical computation of tax shown on your 1944 return which has been verified and corrected if necessary, indicates that the tax paid for that year was in excess of the amount due. You indicated on your return that you desired to have the overpayment applied on your 1945 estimated tax. Your return has not been completely audited, but if the final develops that an adjustment is necessary you will be advised. Income tax withheld, none; estimated [278] tax paid for 1944, $33,685.64; total $33,685.64. Tax liability shown on return $7,805.70; over payment $25,879.94.

The amount of the overpayment will be credited or refunded as indicated below. You will be relieved from the payment of any amount abated; if an over payment has been made and other taxes are due, credit will be made accordingly and any amount refundable is covered by a Treasury Check transmitted herewith. Included in the accompanying check is interest in the amount stated below allowed on the refund.

By direction of the Deputy Commissioner.

Respectfully,

P. H. Sherwood, Head of Division."

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(Testimony of Clifford M. Rice.)

You may take the witness.

Redirect Examination

Q. (By Mr. Patten): You testified that on July 18, 1948, you had a conversation with Mr. McFee in the Samuals Hotel? A. Yes, sir.

Q. Did you have a list of properties and securities at that time? A. I did have.

Q. Did you go over that list with Mr. McFee? [279]

A. Mr. Olsen went over a similar list that he had and I checked off the items that I had on my list.

Q. Did you ask Mr. McFee if you had overlooked anything? A. Yes, sir.

Q. And what did he say?

A. The only items sold were items on the return, one item was $2,550.00 two sales of stock.

Q. Did he mention any bank accounts or assets or property sold? A. No, sir.

Q. That you did not have on your list?

A. No, sir.

Mr. Patten: That is all.

Recross Examination

Q. (By Mr. Emigh): Whether a fund was a revolving fund or not, it would still be an asset?

A. At the end of the period, yes.

Q. That is what I mean.

A. An asset to that extent.

Q. All of the merchandise would be an asset

(Testimony of Clifford M. Rice.)

as to whatever value it had at the end of the period?

A. Yes, not for the entire funds that went through there.

Q. But all of the merchandise would be an asset?

A. Not if the merchandise was sold during the period. [280]

Mr. Emigh: That is all.

Redirect Examination

Q. (By Mr. Patten): In regard to the liquor purchases and in reference to the conversation in Mr. Emasio's office did you ask Mr. McFee where the funds came from to buy the liquor?

A. Yes, sir.

Q. Where did he say they came from?

A. He said they would be accounted for on the Foresters Club's books.

Q. Such liquor as was left there at the end of the year, would that be shown on the Foresters Club's records?

A. They were and the funds were charged to the purchases on the Foresters Club.

Q. Did he tell you that they were charged to purchases?

A. He didn't say and I don't know that he knew.

Q. Did you determine whether they were charged to purchases?

A. I could not find any drawings from the Foresters Club's books from which he could have gotten the money other than what was charged to purchases. There were inventories on the books of the

(Testimony of Clifford M. Rice.)

Foresters Club for large quantities of liquor.

Q. And such liquor was not at the Foresters Club at the end of any year, would that show on their books? [281] A. Yes, sir.

Q. How would it show?

A. As an inventory on hand at the end of the year.

Mr. Patten: That is all.

Recross Examination

Q. (By Mr. Emigh): If the liquor was distributed to the Foresters Club it would show on its inventory?

A. If it was on hand at the end of the year.

Q. And if it wasn't then it would not show.

A. If you will excuse me a minute, I think I have the inventory at the end of 1943 at the Foresters Club.

Mr. Emigh: I think that is all.

Mr. Patten: That is all, the witness may be excused. Your Honor, the Government at this time rests.

The Court: Ladies and Gentlemen of the jury you will be excused for a few minutes, the Bailiff will call you later.

(In the absence of the jury.)

The Court: I thought you may want to make a motion Mr. Emigh.

Mr. Emigh: Your Honor has been handed a motion for judgment of acquittal, that motion is addressed to the proposition that the plaintiff has

wholly failed to prove and establish beyond a reasonable doubt all of the material facts, and [282] allegations alleged in count one of said indictment.

That the nature of the evidence adduced on behalf of the plaintiff is in its entirety circumstantial and that the circumstances as a whole are not of such a nature as to exclude reasonable hypothesis other than that of guilt.

(Argument of counsel and Court reported but not transcribed.)

The Court: The motion at this time will be denied. You may recall the jury.

(In the presence of the jury.)

The Court: Ladies and Gentlemen of the jury, I am going to excuse you at this time until 10:00 o'clock tomorrow morning. You will meet here at that time.

April 29, 1952, 10:00 o'clock a.m.

(Opening statement by Mr. Emigh.)

EDWARD BERGLAND

Called as a witness by the defendant, after being first duly sworn, testifies as follows: [283]

Direct Examination

Mr. Emigh: With permission of counsel, if agreeable with the Court we will call this witness out of order.

The Court: You may do so.

Q. You may state your name.

A. Edward Bergland.

Q. Where do you reside?

(Testimony of Edward Bergland.)

A. Coeur d'Alene.

Q. What is your occupation?

A. Mechanic.

Q. How long have you lived in this community?

A. I was born in Idaho, I have lived here about nine years.

Q. Where did you live prior to that?

A. Deary, Idaho.

Q. During the years 1945 and 1946 where were you employed? A. In Lewiston.

Q. By whom were you employed?

A. By Mr. McFee in 1945 and a portion of 1944.

Q. About, up to September 1945 were you employed by Mr. McFee? A. By Mr. McFee.

Q. In connection with the North Idaho Sales Company? A. That is right.

Q. In what capacity were you employed?

A. I had charge of machines; slots and phonographs.

Q. Were you to repair and service the machines?

A. I serviced the machines and I was collector, in charge of the amusement machines. [284]

Q. And you are following the same occupation in Butte,—I mean in Coeur d'Alene?

A. Yes, sir, but——

Q. But not employed by Mr. McFee?

A. That is right.

Q. Who do you service machines for?

A. The Roundtable, the D. O. F. and I have serviced the Elks.

(Testimony of Edward Bergland.)

Q. Do you service others as you are called upon?

A. Yes, sir.

Q. I think you said you acted as collector for the North Idaho Sales Company?

A. Yes.

Q. And that was from the first of January, 1945, up to the first of September, 1945?

A. That is right.

Q. In making your collections will you explain the procedure that was followed?

A. The gross was accounted for, the pay-off taken off and the balance divided between the location and McFee.

Q. Where did you put this gross and so forth?

A. Right here (indicating) where it called for it.

Q. And that would show the amount taken from the till, the gross amount? A. That is right.

Q. That was on a book similar to Exhibit No. 39?

A. The same thing. [285]

Q. Who had the key for that machine?

A. I had the keys for all of the machines.

Q. Would the proprietor of the place where the machines were be present when you opened the machine?

A. In one or two spots we insisted on it, in all the places they were present, yes.

Q. And was the money counted in his presence?

A. He was there where he could see it always.

Q. And that is true with all of the locations?

A. Yes.

Q. Would he sign a receipt? A. Yes, sir.

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(Testimony of Edward Bergland.)

Q. One was retained in the book?

A. Yes, sir.

Q. And the one that he received was his record?

A. Yes, sir.

Q. What was done with the book?

A. It was brought to the office and given to the girl.

Q. And the book would have two sheets which would show the same record that the proprietor of the location had? A. Yes, sir.

Q. What did you do with the money that you received?

A. Rechecked at the office and checked in.

Q. What was that?

A. The girl at the office would recheck the money. We had an office girl. [286]

Q. In Lewiston? A. Yes, sir.

Q. Is that the last that you had to do with the money?

A. The statement was brought back from the bank where the deposit was made.

Q. Who would make the deposit?

A. The bookkeeper.

Q. The bookkeeper of the North Idaho Sales Company? A. Yes, sir.

Q. You would not have the money counted after you turned it in with the slip? A. Yes, sir.

Q. In connection with that, the money, whatever the commission was that came to the North Idaho Sales Company or to Mr. McFee and the money

(Testimony of Edward Bergland.)

that was turned over to the proprietor comprised the money from the cash box?

A. That is right.

Q. Now, in connection with that did you ever pay any money directly to McFee which you had taken out of the cash box before it was taken to the bookkeeper of the North Idaho Sales Company?

A. No, sir.

Q. And the amount she checked against the book was the correct amount that was taken out of the machines?

A. Yes, sir, it was double checked.

Mr. Emigh: You may cross examine. [287]

Cross Examination

Q. (By Mr. Patten): You were employed by McFee in Lewiston during 1945? A. Yes, sir.

Q. How many machines did Mr. McFee have in Lewiston?

A. I couldn't say but it was between 65 and 70, about two-thirds of them phonographs.

Q. 65 or 70 machines? A. Yes, sir.

Q. Did he have slot machines in the area surrounding Lewiston?

A. Not outside that I took care of, I had phonographs out of town, I had amusement machines at Kendrick but didn't have slot machines outside of Lewiston at that time.

Q. Did you, during the period that you were employed,—did you always make collections?

A. Yes, sir.

(Testimony of Edward Bergland.)

Q. Anyone else?

A. I had a helper, a girl that helped me but I made the collections.

Q. You said that you had a key to the slot machines? A. Yes, sir.

Q. Did anyone else have keys?

A. No, sir, there were no master keys, I had a key for each machine, I had to drill them once or twice, one or two where I lost the key, nobody else had a key.

Q. Do you know of any arrangement whereby the proprietor turned [288] in only forty per cent?

A. No, sir, it was split 50-50. There may have been a phonograph or two that didn't take in enough, I am not sure whether there was a minimum on that or not.

Q. Do you know how many slot machines that Mr. McFee had in 1945?

A. No, I haven't any idea.

Q. Do you know where all of those slot machines were?

A. No, I don't; I worked only at Lewiston,—I guess I worked here a couple of weeks.

Mr. Patten: That is all.

Mr. Emigh: That is all.

ALICE WHITAKER

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Mrs. Whitaker, where do reside? A. In Clarkston, Washington.

Q. Where is that in relation to Lewiston?

A. Across the bridge.

Q. It is a suburb of Lewiston?

A. Yes. [289]

Q. How long have you lived there?

A. About 12 years, this last time.

Q. In 1945 and 1946 what was your occupation?

A. I was managing the Foresters Club.

Q. That was in what town? A. Lewiston.

Q. I understand there was another Foresters Club not in Lewiston? A. Yes, sir.

Q. But you were the manager at Lewiston?

A. Yes, sir.

Q. You became manager shortly prior to 1945?

A. Yes, sir.

Q. And you continued as such manager throughout 1945 and 1946? A. Yes, sir.

Q. Prior to being manager, were you employed at that place before that time?

A. Yes, I tended bar and waited tables.

Q. In connection with acting as manager, after you became the manager what were your duties?

A. I had to see that the supplies were in; that they had enough stock, that the help was hired and everything in general.

(Testimony of Alice Whitaker.)

Q. Did you have anything to do with the money that was taken in? A. Yes, sir. [290]

Q. What did you do with that?

A. I counted the money, I checked it and I banked it.

Q. When sales were made was the money recorded in a cash register? A. Yes, sir.

Q. What did you have to do in connection with the cash register?

A. I rang up the sales.

Q. When you made a sale? A. Yes.

Q. When you didn't make the sale, the bartender or whoever it was would ring up the sales?

A. That is right.

Q. Did the cash register have a tape on it?

A. Yes, sir.

Q. At the end of the day what would you do in connection with the money?

A. I would take the tape reading and check the money.

Q. You would verify the money with the tape reading? A. Yes, sir.

Q. What did you do with the money then?

A. I put it in the safe.

Q. Where was the safe? A. In the club.

Q. And you would keep it there until when?

A. Twice a week I banked. [291]

Q. Did you make the deposits yourself?

A. Yes, sir.

Q. Did you keep a record of the cash register receipts?

(Testimony of Alice Whitaker.)

A. Yes, I had a daily sheet that I made out.

Q. Did you keep the deposit slips?

A. Yes, sir.

Q. What did you do with the cash register,—with the recording from the cash register tape and the deposit slip?

A. Each day I would make out a daily report and put the cash register tape on it. I banked twice a week and put the deposit slip with these daily reports.

Q. To whom would you deliver them?

A. To Coeur d'Alene, to the North Idaho Sales Company.

Q. You sent them to Coeur d'Alene?

A. Yes, once a week.

Q. You may state whether or not during the time you were there, Mr. McFee kept money which was not the Foresters Club's money in that safe?

A. He had a personal file.

Q. In the form of some kind of folder?

A. Yes, it was.

Q. Do you have any recollection of any transaction with Mr. Sonduck in relation to the money kept there by Mr. McFee? A. Yes, sir.

Q. Just what was that, generally?

A. Mr. McFee called me and told me to give him some money. [292]

Q. Do you remember the amount?

A. Yes, $1,000.00.

Q. Did you have that?

A. Yes, I took it out of his personal file.

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(Testimony of Alice Whitaker.)

Q. Did you place anything in the file to show that the money was taken? A. Yes, sir.

Q. What was that? A. I put this slip in.

Q. You put in a slip? A. Yes, sir.

Q. That was the transaction you remember in connection with that business? A. Yes, sir.

Q. On each occasion and date, all of the time, were the receipts from the Foresters Club accounted for by you in the manner that you have described?

A. Yes, sir.

Q. Did you, in connection with that business, maintain a petty cash fund? A. Yes, sir.

Q. For the operation of the business there from day to day? A. Yes, sir.

Q. How much was that?

A. I cannot say truthfully, it was quite a while ago.

Q. Was it a large amount? [293]

A. I cannot say definitely, but I don't think that it was too large.

Q. In connection with the collection of the slot machine receipts would you be present when these were accounted for? A. Yes, sir, I was.

Q. And is the procedure described by the preceding witness,—Is that the way it was generally done, was that the procedure that you followed?

A. Yes, sir.

Mr. Emigh: That is all, you may examine.

Cross Examination

Q. (By Mr. Patten): You stated that Mr. Mc-

(Testimony of Alice Whitaker.)

Fee had a personal file in the safe? A. Yes.

Q. Did he have it there on January 1, 1945?

A. Yes, sir.

Q. How much money did he have in that file?

A. It varied in amounts.

Q. Was it a big amount or a little amount?

A. I cannot say, it has been quite a few years ago.

Q. You looked in there? A. Yes, sir.

Q. Will you indicate with your hand, how—withdraw that please—What type of bills were in there? [294]

A. Well, it was a regular file with slots in it.

Q. Would it have $5,000.00, $10,000.00 or $15,000.00? A. It was his personal file.

Q. But you got money for Mr. Sonduck out of it? A. Yes, he told me to.

Q. How much was in there at that time?

A. I honestly don't remember.

Q. How much was there on December 31, 1946?

A. I cannot say.

Q. Was there lot of money or a little bit?

A. I cannot say.

Q. Was it more than there was there in 1945 or less? A. I don't remember.

Q. You stated that you went into the folder and gave the money to Mr. Sonduck? A. Yes, sir.

Q. Did you take any money out for anyone else? A. Well, I remember that time.

Q. In 1945 or 1946?

A. I remember that instance, Mr. McFee called

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(Testimony of Alice Whitaker.)

me. I don't remember any other instance.

Q. Well, the money came in and went out, how do you recall that particular instance?

A. Yes, I recall that particular instance.

Q. And will make the statement under oath to this court that you didn't take any other money out of there? [295]

A. I don't remember any other though I do remember that instance.

Q. Why do you remember that instance?

A. I don't know.

Q. Did you discuss the Sonduck instance with counsel before you took the stand?

A. Maybe because it was a $1,000.00 and it seemed like a lot of money to me.

Q. Did you discuss the Sonduck incident with counsel? A. Yes.

Q. You discussed this $1,000.00 for Mr. Sonduck with counsel, did you? A. Yes, sir.

Mr. Patten: I think that is all.

Redirect Examination

Q. (By Mr. Emigh): What was your maiden name?

A. At the time I was working at the club my name was Hancock.

Q. What was your maiden name?

A. Evans.

Q. You had nothing to do with putting money in there, in that file, or keeping any account of the money that McFee had? A. That is right.

(Testimony of Alice Whitaker.)

Q. If you took money out of that file at other times under Mr. McFee's instructions is it a fact that you followed the [296] same procedure that you did when you took the money out for Mr. Sonduck? A. Yes, sir.

Mr. Patten: We object to that as a conclusion of the witness.

The Court: The answer may stand.

Q. Your answer was yes?

The Court: You are assuming that she didn't remember anything she has answered but if you think it is important I will consider this matter, I don't think that it is. I think I will let the answer stand.

Q. Do you know how the money got to Mr. McFee's personal file?

A. No, sir, I had nothing to do with that.

Q. Was it money that appeared to be put in by the Foresters Club?

A. It was his personal file.

Q. You put no money in there out of the Foresters Club? A. I did not.

Mr. Emigh: That is all.

Recross Examination

Q. (By Mr. Patten): How many slot machines did you have in the Foresters Club in 1945 and 1946? A. Six I believe it was. [297]

Q. And what was the denomination of those?

A. There were two quarter machines, two dimes, one half and two nickels.

Mr. Patten: That is all.

Mr. Emigh: That it all.

R. E. McDONNELL

Called as a witness by the defendant, having been heretofore duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): You previously appeared as a witness? A. Yes.

Q. In the year 1943, and up to 1945 you may state whether or not you had a wholesale liquor stamp. A. Yes, sir, I did.

Q. There was some testimony yesterday by Mr. Rice of an investigation of Mr. McFee's business, and there was reference to $114,000.00 in liquor, are you familiar with that transaction?

A. Yes, sir.

Q. Of that money, did Mr. McFee advance you any of it? A. Yes, sir.

Q. How much? [298]

A. The figure of $114,000.00 less $3,800.00 and $7,500.00.

Q. That would be around $101,000.00 that he advanced on that? A. Yes, sir.

Mr. Patten: Was it $7,500.00 you said?

A. Yes.

Mr. Patten: You are talking about the $114,000.00 item, I can't get at your figures.

Q. How much came out of that $114,000.00?

A. Two items, $7,500.00 that was my money, and $3,800.00 belong to another fellow.

(Testimony of R. E. McDonnell.)

Q. That would be $11,300.00 which was not McFee's money? A. Yes.

Q. The remainder was McFee's money?

A. Yes, sir.

Q. You may state whether or not this money was returned to McFee in whiskey or cash.

A. Yes, sir, it was.

Q. You may state whether or not this entire amount so advanced or any money was returned to McFee in whiskey or cash?

A. That is right, yes, it was,—that is correct.

Mr. Emigh: You may cross examine. [299]

Cross Examination

Q. (By Mr. Patten): Mr. McDonnell, were you subpoenaed by the defense?

A. I was asked to testify by the defense.

Q. Did you receive a subpoena from the defense?

A. I was subpoenaed by the Government and then released.

Q. How long have you known Mr. McFee?

A. Since 1921 or 1922.

Q. Has that association been very cordial and intimate? A. Yes, it has been.

Q. What are you doing now, Mr. McDonnell?

A. Running a tavern.

Q. Where? A. At Wallace, Idaho.

Q. Where in Wallace is your tavern?

A. At the Samuals Hotel.

Q. Who owns the Samuals Hotel?

(Testimony of R. E. McDonnell.)

A. To my knowledge, Mr. McFee.

Q. You stated that Mr. McFee loaned you about $111,000.00?

A. No, I didn't say that; he advanced it to me for this liquor.

Q. Was there any record made of that transaction? A. Yes, I think so.

Q. And was that reported on your income tax return?

A. No, it wasn't my transaction.

Q. You had no interest in this business?

A. Yes, I had $7,500.00.

Q. How do you know that Mr. McFee advanced $114,000.00?

A. He gave me the money and I bought whiskey with it. [300]

Q. From whom did you buy this liquor?

A. From Herman Pastor and Sam Teran.

Q. When was the first time you purchased liquor and from whom?

A. The exact date I am not positive of but I think it was in July.

Q. July of what year? A. 1943.

Q. In July of 1943? A. Yes, sir.

Q. From whom did you buy this liquor?

A. From Pastor and Teran.

Q. What kind of liquor did you get?

A. Various brands,—various kinds.

Q. How much did you spend at that time?

A. There was around $114,000.00 put up for whiskey.

(Testimony of R. E. McDonnell.)

Q. At this time in July that was put up for whiskey? A. About that time, yes, sir.

Q. We are talking now, Mr. McDonnell, about the first load of liquor in July, 1943.

A. In July, 1943, I went to St. Paul with most of this money and gave it to those two fellows.

Q. How much of this money did you have?

A. I couldn't say to the penny but it was around $70,000.00 or better.

Q. You went with $70,000.00 to St. Paul?

A. Yes. [301]

Q. And you bought all of this liquor?

A. Yes, sir.

Q. Did you pay the money personally to Sam Teran and Tony Pastor? A. Yes, sir.

Q. Where was this? A. In St. Paul.

Q. Where in St. Paul?

A. At the Mayflower Novelty Company on University Avenue.

Q. Do you recognize the signature on the bottom of that document (indicating)?

A. Well, I am not positive of it.

Q. Whose does it look like?

A. A. F. McFee's.

Mr. Patten: May I read the statement to the jury?

Mr. Emigh: We object to this, we think at least it should be put in evidence before it is read.

Mr. Patten: I offer it in evidence as Exhibit No. 54, and I will ask another question.

Q. You have known Mr. McFee for a number

(Testimony of R. E. McDonnell.)

of years? A. Yes, sir.

Q. And are you familiar with his signature?

A. I have seen it quite a bit.

The Court: Now, do you have any objections?

Mr. Emigh: We object to it as incompetent, irrelevant and immaterial and not identified as to have any connection [302] with this case. It is a violation of the Constitutional rights of the defendant to admit this.

The Court: It may be admitted.

Mr. Patten: Now, may I read it to the jury?

The Court: Yes, you may.

Mr. Patten: "I, A. F. McFee, manager of the North Idaho Sales Company, Wallace, Idaho, make the following voluntary statement to Stephen B. Derringer and W. F. Morrison, known to me as Investigators for the Office of Price Administration and Agency of the United States Government. That Saturday, August 6, 1943, I received from a firm known as Minnesota Canning Company, 475 cases of whiskey, being 425 cases of Tom Burns a bourbon blend and 50 cases of Sloe Gin. Shipped by the foregoing company via Oskey Brothers Truckline of St. Paul, Minnesota. That for this shipment I paid $25,300.00 cash to an unknown fellow in Duluth, Minnesota. All I know about the fellow who sold the liquor is he was Jewish. That under oath I swear the entire contents of this shipment was whiskey and not canned peas a rationed commodity as the shipment was described on the bill of lading. That I am the sole owner

(Testimony of R. E. McDonnell.)

of the North Idaho Sales Company and we have not sold, nor have we purchased any groceries or food rationed by the United States Government, and we have no intention to traffic in any rationed foods." That is signed by A. F. McFee and it is dated at Wallace, Idaho the 11th of August, 1943, and it is witnessed by Stephen B. Derringer. [303]

Q. Now, Mr. McDonnell, you stated that in July of 1943 you purchased $70,000.00 worth of whiskey, would you care to change that statement?

A. I didn't say $70,000.00 worth, I can clear up this whiskey deal, it was,—I said that it was used to purchase,—we made a trip to Duluth with this fellow Pastor and he purchased the whiskey there.

Q. You said that you were handling it.

A. I did, but Pastor was delivering it to us, he was the one that delivered it.

Q. Did you purchase this whiskey all at one time?

A. The money was deposited there and as the whiskey was found it was shipped up here.

Q. When did you receive the first of whiskey?

A. I forget whether it was in August or October.

Q. Did you receive all of the whiskey at one time?

A. No, sir, this 475 cases was received at one time.

Q. Isn't it a fact that you received whiskey at regular intervals all during the year 1943?

(Testimony of R. E. McDonnell.)

A. Not regular, but at different times.

Q. Isn't it a fact that as you sold one lot you bought another?

A. I would not say that; I would sometimes we would receive two lots before one was sold; another thing was that pretty regularly loads of whiskey was demanded or needed in these clubs. I had to have whiskey in my place and as I ran short or as McFee ran short we would need more. [304]

Q. Did you keep any record of the whiskey that you received and the money you paid, when you paid and to whom you paid it?

A. I believe it was, I didn't.

Q. Have you seen such a record?

A. Years ago.

Q. Do you have it now?

A. No, I don't,—he sold more than I did.

Q. Start in with June of 1943 and tell us about the whiskey that you got?

A. I don't think that we got any at that time

Q. Did you purchase any?

A. If I recall right, it was in July.

Q. In July?

A. Yes, but I could be wrong.

Q. How much did you purchase then?

A. We deposited about $70,000.00 with this May flower Novelty Company.

Q. Did you take this $70,000.00 then to the May flower Novelty Company? A. Yes, sir.

Q. In currency? A. Yes, sir.

Q. And you gave them these funds in July?

(Testimony of R. E. McDonnell.)

A. I can't remember the exact date, it is not clear in my mind.

Q. Why didn't you get all of the whiskey at that time? [305]

A. It wasn't available, you had to have a way of getting it out.

Q. Would it refresh your memory for me to mention Yiddy Bloom and Little in Duluth, Minnesota?

A. I remember a fellow,—meeting a fellow by the name of Little.

Q. Did he have anything to do with this transaction? A. Not that I remember.

Q. If you had paid Teran and Pastor the $70,000.00 then will you explain this $25,300.00 payment made a little later?

A. Of course there was more money than this $70,000.00,—the $70,000.00 was given to Pastor, it was put in there the following day I believe, we arrived in St. Paul and it was the following day I think, I don't remember the date.

Q. You said that Mr. Pastor was the man who gave the money to this other man, the man mentioned in this affidavit.

A. I think I am right in that.

Q. Do you know about funds that were transferred at the Davenport Hotel in Spokane, in September of 1943? A. Yes, sir.

Q. Will you tell the jury about this?

Mr. Emigh: We object to that it is not proper

(Testimony of R. E. McDonnell.)

cross examination and it is not shown to be related to this transaction.

The Court: He may answer, this matter of the purchase of liquor was brought about by your examination.

A. Mr. Pastor came out to Idaho to pick up some more money.

Q. If he had $70,000.00 on deposit why did he need more money? [306]

Mr. Emigh: That is objected to as being argumentative.

The Court: He may answer.

A. He was out here doing other business with other people and at that time he picked up this money.

Q. Does it refresh your memory to say that in October of 1943 there was a certain amount expressed,—may I ask first how much Mr. Pastor was given in the Davenport Hotel in Spokane?

A. I don't remember.

Q. You were in that transaction?

A. I don't remember.

Q. Does the figure $27,000.00 refresh your memory?

A. It may have been only that, but that figure doesn't click.

Q. You were handling these funds that you got from Mr. McFee? A. Yes.

Q. But you don't remember the amount that you gave the gentleman in the hotel?

A. No, I don't.

(Testimony of R. E. McDonnell.)

The Court: I will excuse the jury at this time, but we will not recess for a moment.

(In the absence of the Jury.)

The Court: I just want to caution you Mr. McDonnell, and I want the record to show that this is in the absence of the jury but the reporter is here, I want to tell you that of course the reporter is taking down your testimony and so far in your testimony it is quite questionable in the Court's mind whether you have been hewing to the line or not. It is the [307] practice of this Court in cases where it is questionable as to the truth of testimony given, to refer the record and all of the testimony of the witness who might be questioned,— I don't say that you are not telling the truth but as I say, it is my practice where there is a question to refer it to the prosecuting officers for their investigation. It is very important that all witnesses hew to the line and tell the truth. I recognize the matter of friendship and the pressure that may be put on the witness but the charge that may be brought against one for testifying falsely is perhaps more serious than income tax evasion. That is all I have to say. I think we will recess at this time for 15 minutes.

April 29, 1952, 11:10 o'clock a.m.

Q. Is it your testimony that you received from Mr. McFee and gave to Herman Pastor and Sam Teran approximately or practically $70,000.00 or more in July of 1943?

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(Testimony of R. E. McDonnell.)

A. What do you mean by more?

Q. How much did you give Sam Teran and Tony Pastor?

A. At the first time we purchased whiskey?

Q. Yes. A. About $70,000.00.

Q. And you also testified that Mr. Pastor gave a Jewish fellow $23,500.00 of the money that you gave him. [308]

A. I don't remember that.

Q. Well, I remember it distinctly, did he or did he not?

A. I said that who gave the Jewish fellow money?

Q. You heard the statement read that the Jewish gentleman in Duluth, Minnesota, was given $25,-300.00, you told the jury that Mr. Pastor took some of the money you gave him and went over and paid another person.

A. To my best recollection, that is the truth.

Q. You have been handed a document, will you look on both sides and tell me if you know what that is?

A. It looks like a part of Mr. McFee's bank account.

Q. You testified that this transaction took place in August and that the amount this gentleman was given was $25,300.00, did you see that man in August? A. Yes, I did.

Q. What was the date in August?

A. August 6.

Q. 1943? A. Yes.

(Testimony of R. E. McDonnell.)

Q. What is the amount of the check that went through the North Idaho Sales Company bank ac-on that date? A. $21,000.00 and a——

Q. ——Will you read that again?

A. Oh, yes, here, $25,300.00.

Q. Have you ever been convicted of an offense?

A. Yes. [309]

Q. A felony?

A. I am not sure that it was a felony.

Q. What disposition was made of the case?

Mr. Emigh: We object to this as it is not a proper question.

The Court: He may answer.

A. I think it was a felony, it was an O.P.A. charge.

Q. You are certain that it was an O.P.A. charge?

A. We were charged with conspiracy and plead guilty to an O.P.A. charge.

Q. Where was that and when?

A. In St. Paul, in 1944.

Q. Was that the only time you have been convicted of a felony?

Mr. Emigh: That is objected to as incompetent, irrelevant and immaterial; counsel is going beyond the proper limits of examination as to this nature of testimony.

The Court: It has nothing to do with this case, I presume it goes to the credibility of the witness.

A. May I answer, Your Honor?

The Court: Yes.

POOR COPY

(Testimony of R. E. McDonnell.)

A. In Bismarck, North Dakota I plead guilty in 1946.

Q. And that transaction related to this business that we are talking about now?

A. It was over liquor, yes sir.

Q. Isn't it a fact Mr. McDonnell that you purchased one load of liquor in July, 1943 and later you bought another load [310] in August of 1943 and paid for it instead of paying for it all at once?

A. I don't remember the date that was.

Q. Where did the $25,300.00 come from that was paid in Duluth?

A. To the best of my knowledge, as near as I can remember Pastor paid for it.

Q. Why is this charge on the same date in the bank account? A. I don't know.

Q. Isn't it a fact that in September you bought still another load and paid $27,000.00 in the Davenport or perhaps, you don't remember that?

A. I remember the transaction in the Davenport too since the question was mentioned. That doesn't mean that there was another load, that doesn't necessarily mean that.

Q. Isn't it a fact that in October of 1943 you bought another load and sent $20,000.00 by express?

A. I can't answer that yes or no without explaining it.

Q. Whether you did or not, can't you answer that. Did you get a $110,000.00 or more worth of liquor, did you give that at one time, in one sum,

(Testimony of R. E. McDonnell.)

or did you buy liquor throughout the year and pay for it in that way?

A. Different payments, it is not a fact that every time there was a payment made there was load came to Idaho.

Q. You testified that you gave between $70,000.00 and $110,000.00 at once, do you wish to alter that statement? A. Yes, sir, that is correct.

Q. Do you recognize the signature on that?

A. No, I don't.

Q. You never met him?

A. Yes, but I have not seen his signature so far as I know, this is the first time.

Q. Does anything on that document refresh your memory or cause you to see that in a different light?

A. There is nothing there to refresh my memory.

Q. It does not refresh your memory?

A. No, that confuses me.

Q. You still wish to say that you gave Pastor $114,000.00?

Mr. Emigh: I understood he said that he gave him $70,000.00.

Q. How much did you give him?

A. About $70,000.00, it may have been $65,000.00 or $70,200.00.

Mr. Emigh: Did you mean $65,000.00 or $6,500.00? A. $65,000.00.

Q. Does that record differ from your memory?

A. Yes, it does.

Q. Whose signature does it appear to be?

(Testimony of R. E. McDonnell.)

A. Herman Pastor's.

Mr. Emigh: We object to whose it appears to be.

The Court: He may answer.

A. Mr. Pastor's.

Q. What does Pastor say about the transaction?

Mr. Emigh: Now we object to using it, this is bringing [312] or attempting to bring it in by the back door.

The Court: I will sustain the objection; you may question him on matters that you think will change his recollection but as far as the document is concerned it is not admissible at this time.

Q. You do not wish to look at your statement?

A. This doesn't refresh my memory, in fact my memory is pretty clear.

The Court: Just answer the question, whether you wish to look at your statement or not.

A. No, I don't.

Q. You deny that the sum paid to Pastor in July was $42,000.00?

Mr. Emigh: We object to this, the witness is being asked on matters that are not proper cross-examination.

The Court: He may answer.

Mr. Emigh: We object to using this document at this time.

The Court: He is not using it, he asked the witness something else.

Q. You deny that in July of 1943 the sum paid was $42,000.00?

Mr. Emigh: We object to this question as——

(Testimony of R. E. McDonnell.)

The Court: ——The Court has ruled on this matter now let's get along.

A. No, I don't deny that he wasn't paid the $42,000.00.

Q. You stated that he was paid $70,000.00?

A. Yes, sir. [313]

Q. And you deny then that he was paid $42,000.00? A. No, I don't.

Mr. Emigh: We object to that question, it is not a fair inference of what the witness' evidence is.

The Court: He may answer.

A. There was about that amount taken back in cash after we arrived in St. Paul, yes, there was more money given me that I gave Pastor.

Q. You deny that in August of 1943 some person was paid $27,300.00 with funds drawn from the North Idaho Sales Company?

Mr. Emigh: We object to that, he says that he has no knowledge, he hasn't denied it; we object to the form of the question as improper, it is imputing to the witness that he denies matters that he cannot and could not testify about.

The Court: The witness may answer.

Q. Do you deny that a person unknown was paid $25,300.00 in August of 1943 in Duluth, with funds withdrawn from the North Idaho Sales Company? A. No, I don't deny that.

Q. Do you state—you previously stated that the funds came from Tony Pastor?

A. You were talking about a certain load of liquor that to my knowledge came from Pastor. The

(Testimony of R. E. McDonnell.)

money that he received through me. I don't deny that some persons didn't receive that money. [314]

Q. Do you deny that in September 1943 $25,000.00 was paid to Herman Pastor in the Davenport Hotel?

Mr. Emigh: The witness didn't deny that, he didn't fix the amount; we object to this question, it is not fair to the witness.

The Court: He may answer.

A. I don't deny that, I don't deny that any was paid to this man or that he was paid that amount.

Q. Do you deny that in October 1943 $20,000.00 was sent by express to Mr. Pastor?

Mr. Emigh: May I have an objection to that same line of questioning, it is not fair to the witness to base questions on something that he did not deny.

The Court: I think perhaps you better make your objections and this one will be denied and he may answer.

A. No, I don't deny that.

Q. What happened to the last load of liquor that came out of St. Paul?

Mr. Emigh: I think it is an improper question and I object.

The Court: He may answer.

A. I cannot truthfully remember. I think that liquor was distributed in several different places and it would be hard to remember which load went to which place.

Q. You don't remember that load being condemned and being seized? A. No, I don't.

(Testimony of R. E. McDonnell.)

Q. You were in Bismarck?

A. Are you talking about Fargo?

Q. Fargo or Bismarck, this was your liquor?

A. I was handling liquor.

Q. You would not remember if you lost a truck load of liquor?

A. I remember that very well, but it wasn't the last load.

Q. There was a load that had been seized?

A. Yes, sir.

Mr. Patten: I believe that is all.

Redirect Examination

Q. (By Mr. Emigh): Was that recovered?

A. Yes, it was.

Q. Your testimony was, I believe, that you received this advance from Mr. McFee of $114,000.00 less the two items that you gave us?

A. Yes, sir.

Q. Less the two items you gave before any liquor was delivered or money paid back to McFee?

A. That is correct, the other two items were at first.

Q. How long have you been in the Metals Bar?

A. Since 1936.

Q. Were you in the Metals Bar before the building was purchased by Mr. McFee? [316]

A. Yes, sir.

Q. How long before that were you there?

A. I think he has had it about five or six years, I cannot be sure on that.

Mr. Emigh: That is all.

Mr. Patten: That is all.

JEAN DELLYEA

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Your name is Jean Dellyea? A. Yes sir.

Q. Where do you reside?

A. Right now in a trailer house.

Q. What do you do?

A. I am a waitress.

Q. What did you do in 1945 and 1946?

A. I was the manager of the Foresters Club in Coeur d'Alene, Idaho.

Q. You were employed by that club?

A. Yes sir.

Q. During that entire period? [317]

A. Yes sir.

Q. In connection with your employment at that club, what were your duties?

A. To hire and fire and to take care of the money and make up the daily reports.

Q. In connection with the daily reports, how was the money handled?

A. Every night I would take the total off the cash register, put the money in a sack and put it in a safe.

Q. What did you do by way of making a record?

A. On the cash register, I took the daily report

(Testimony of Jean Dellyea.)

sheet total, the register showed the total of what we took in and that was our report.

Q. The tape on this cash register?

A. Yes, sir.

Q. You would make up a daily report from that?

A. Yes sir.

Q. And what would you do with the money?

A. Put it in the safe.

Q. What would you do after you put it in the safe?

A. Lou Dolan would come up from the North Idaho Sales Company and check the money over and take it.

Q. Out of the paid cash funds did you pay items as cash expenses? A. Yes sir.

Q. And did you keep a record of that? [318]

A. Yes, sir.

Q. And was that turned to the North Idaho Sales Company? A. Yes, sir.

Q. Did you keep a memorandum of slot machine receipts? A. Yes, sir.

Q. The memorandum that you kept, was that retained by the Foresters Club? A. Yes, sir.

Q. Did you ever make the deposits?

A. No, sir, I didn't.

Q. Other than petty cash items, did you keep any money out of the receipts of the Foresters Club? A. No, sir.

Q. How much would be kept out of the paid cash funds?

A. You mean how much we kept to operate on?

(Testimony of Jean Dellyea.)

Q. Yes.

A. About $2,000.00 we kept to operate on.

Q. When collections were made from slot machines would you be present? A. Yes, I was.

Q. And what was done with the money taken out of the cash box on the slot machines?

A. You mean taken out of the slot machines?

Q. Yes.

A. I would take part of it and the North Idaho Sales Company would take part of it. [319]

Q. Was all of the money taken out of the cash boxes? A. Yes, sir.

Q. Was it entered in a book of any kind?

A. Yes, we had a receipt.

Q. And that book was in the possession of anyone particularly? A. What do you mean?

Q. Who brought that book over to you?

A. The North Idaho Sales Company.

Q. The collectors? A. Yes, sir.

Q. Were entries made in the book at the time the money was taken out of the machines?

A. After we counted the money.

Q. Was the gross amount taken out of the cash box and entered in the book? A. Yes, sir.

Q. I understand that there were three sheets in that book, one very thin and two thicker ones?

A. That is right.

Q. The top sheet was given to you?

A. Yes, sir.

Q. Did you sign the book? A. Yes, sir.

Q. Before the receipt was taken out?

(Testimony of Jean Dellyea.)

A. Yes, sir.

Q. Your signature was on this slot machine, receipt, all of [320] your receipts of that kind?

A. Yes, sir.

Q. Your share was placed in the funds of the Foresters Club? A. Yes, sir.

Q. The other half was taken by the North Idaho Sales Company? A. Yes, sir.

Q. At any time, to your knowledge, while you were operating that place was there,—strike that please,—did that book which was signed by you and in the hands of the collector fail to show the correct amount taken out of the machines?

A. No, sir.

Q. And your collections from the Foresters Club were then banked, how often would you say?

A. I cannot tell you because I did not do the banking.

Q. How often did you deliver the cash that you received and the records of the receipts of the cash?

A. Every day.

Q. The cash receipts and the slot machine receipts were delivered to the North Idaho Sales Company? A. Every day.

Q. And were those correct accountings of the money, less the current expenses consisting of moneys retained for the petty cash funds?

A. Yes, sir.

Q. The petty cash fund was maintained at around $2,000.00? A. Yes, sir. [321]

Q. And that was used for the expense of the

(Testimony of Jean Dellyea.)

business? A. Yes, sir.

Mr. Emigh: You may take the witness.

Cross Examination

Q. (By Mr. Rossi): What was your occupation prior to 1945 and 1946? A. Waitress.

Q. How long were you employed as manager of the Foresters Club?

A. In 1945 and part of 1946.

Q. How many months?

A. About four months in 1946.

Q. And all of the year 1945? A. Yes, sir.

Q. Where was the Foresters Club in Coeur d'Alene? A. In the Powell Building.

Q. How many machines did the Foresters Club have?

A. At that time I think we had about six machines.

Q. Can you tell the denominations of the machines?

A. We had half-dollar machine, a couple of quarter machines and we had a dime machine I remember and some nickel machines.

Q. You stated that you didn't deposit the money in the bank for the Foresters Club?

A. That is right.

Q. Who did? [322] A. Lou Dolan.

Q. Who is Lou Dolan?

A. She works for the North Idaho Sales Company.

Q. The person collecting for the North Idaho

(Testimony of Jean Dellyea.)

Sales Company also deposited the money for the Foresters Club? A. Yes, sir, that is right.

Q. Who was the owner of the Foresters Club?

A. Mr. McFee.

Q. Did you know whether Mr. McFee had an interest in the North Idaho Sales Company?

A. Yes, sir, he did.

Q. At the time that you operated the Foresters Club in 1945 what was the general business condition with respect to the Club?

A. In 1945 business wasn't too good, in fact I was there about 2 months practically by myself, with just one floor girl.

Q. What about 1946?

A. Business was better then.

Q. During the time that you operated the club in Coeur d'Alene can you give any estimate as to the monthly income from slot machines?

A. No, sir.

Q. How much weekly income was there from the slot machines? A. No, I cannot tell.

Q. Can you give any estimate as to the daily take?

A. No, because it was different, the business wasn't anything [323] like it was before that time.

Q. In 1946 you say the business was good, can you give an estimate of the daily take, or between what amounts it would vary?

A. No, I can't. Our slot machine play wasn't too good.

(Testimony of Jean Dellyea.)

Q. Can you give an estimate in dollars and cents?

A. From $50.00 to $100.00 a day in 1946, and it wasn't even that good lots of days.

Q. $50.00 to $100.00 a day?

A. That was when business was better, lots of times it wasn't that good.

Q. What was your salary as manager of the Foresters Club? A. It was sixty dollars.

Q. A week? A. Yes.

Q. You had no interest in the business?

A. No, sir, not a bit.

Q. Who hired you?

A. I was hired by Mr. McFee.

Q. Did you manage any club prior to 1945 and 1946? A. No, sir.

Q. Have you ever run one afterwards?

A. I worked in lots.

Q. You were never manager prior to that time?

A. No, I have taken on lots of responsibilities but I cannot say I was the manager of one. [324]

Q. Were you acquainted in any way as to the number of slot machines that Mr. McFee or the North Idaho Sales Company had in Coeur d'Alene?

A. No.

Q. Do you know whether they had any besides the ones in your place of business? A. No.

Q. You were just an employee of Mr. McFee both with respect to the North Idaho Sales Company and the Foresters Club?

A. That is right.

(Testimony of Jean Dellyea.)

Q. Did Mr. McFee keep any money in the Foresters Club other than his drawing account in the bank? A. How do you mean?

Q. Did he have any cash or papers in the safe?

A. He had some cash.

Q. How much cash?

A. I don't know; that is something that I never bothered with.

Q. Were you ever asked to withdraw any cash from his personal papers for any reason at all?

A. No, I wasn't.

Q. You had nothing to do with that at all?

A. No, it wasn't anything to me.

Q. In what form was this money that Mr. McFee had in the safe, was it in a package?

A. It was in a large envelope.

Q. Was it a large or small amount? [325]

A. It was in a folder about the size of an envelope.

Q. Was it sealed? A. Yes, sir.

Q. At any time while you were there were you asked to get any money out of that folder?

A. All I did was put the money in the safe.

Q. Did you ever put money into this folder or envelope? A. No, sir.

Q. At any time that you were manager of the Foresters Club did Mr. McFee come in and pick up any of this money?

A. No, sir, not that I know of.

Q. You didn't know whether there was any money in that envelope or not?

(Testimony of Jean Dellyea.)

A. No, I didn't figure it was any of my business.

Q. It might have been just paper?

A. It might have been.

Mr. Rossi: That is all.

Redirect Examination

Q. (By Mr. Emigh): As to the payment of the employees, how was that handled?

A. They were paid by check.

Q. Out of what office?

A. The North Idaho Sales Company. [326]

Q. You had nothing to do with the handling of the money after you collected it and turned it over to the North Idaho Sales Company?

A. That is all that I had to do with it.

Q. Other than the petty cash.

A. That is right.

Mr. Emigh: That is all.

Mr. Rossi: That is all.

LEONARD SHERMAN

Called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): How old are you?

A. 37.

Q. How long have you lived in this community?

A. For 10 years.

Q. And what has been your employment for the last 15 years?

(Testimony of Leonard Sherman.)

A. Well, the last 12 years for the North Idaho Sales Company.

Q. Before that?

A. Well, there was truck driving and other different things.

Q. During the 12 years that you have been employed by the North Idaho Sales Company what work have you done generally? [327]

A. Well, for a while I was mechanic and serviceman.

Q. Serviceman and mechanic for what?

A. Coin operated devices.

Q. Did that include different kinds of machines?

A. Slot machines, phonograph, and free plays.

Q. During that time have you been manager of the Coeur d'Alene office? A. Yes, sir.

Q. For how long? A. About 10 years.

Q. And in connection with your work as manager, and serviceman have you collected for the concern? A. That is right.

Q. What monies have you collected?

A. Well, I would go to the location; I would take a book out of the main office in Wallace, this is a branch office. I would take it out of the office and go out and collect and bring back the money.

Q. Did you make the collections?

A. Yes, sir.

Q. Did any other persons make collections during the period you were making collections?

A. Very seldom.

(Testimony of Leonard Sherman.)

Q. Will you just describe the procedure to the jury in making those collections?

A. Well, I would take a book, a commission book out of the office—— [328]

Q. ——You refer to a commission or collection book, was it similar to Exhibit No. 39 which is handed to you? A. That is right.

Q. Was that the same form used by that concern since you have been working for it?

A. Yes.

Q. Now proceed to tell the jury how each step was taken in making this collection.

A. I would take this book and go to a location, I would write down the date and the name of the location and take the money out of the machines and set it down and then with the proprietor of the location we counted it. If there was any pay-outs we took that out first and put the amount to divide down. They would go over the commission to see what they were and then they would sign and I would sign; I gave them a carbon copy and the original and tissue were left in the books, I would bring the book in and check it in the office, I would check out with the office girl.

Q. What would you do with the money collected?

A. It would have to correspond with this book.

Q. And did it do that? A. Yes, sir.

Q. Did you turn the money in with the book?

A. Yes, sir.

(Testimony of Leonard Sherman.)

Q. Do you have anything to do with making the deposits or did [329] you?

A. No, not down here, I turned it into the office and she made the deposits.

Q. Did you accompany her on occasions?

A. I might have drove her up there.

Q. The money was then deposited by the girl and not by you? A. That is right.

Q. What did you mean by pay-outs?

A. If we had a short pay I,—if there was a few nickels and dimes in the phonograph I would give it back.

Q. If there was a little money in the machines, you would return it? A. Yes, sir.

Q. And would it show on the slip?

A. No, sir, it would be done before I set the gross down in the books.

Q. There would be no record of that?

A. No.

Q. Would that be of any consequence in amount?

A. No, sir.

Q. What would you say the maximum of that would be at any one time?

A. That would be hard to say, it would depend a lot on what it was, where the location was.

Q. It would depend on the phonograph?

Mr. Rossi: I would like to have the witness testify [330] and not the counsel.

Q. I am referring now to what the amount was?

A. I cannot say exactly as to the pay-outs, but I know it wasn't very much.

(Testimony of Leonard Sherman.)

Q. That is pretty indefinite.

A. Sometimes $50.00 or $60.00.

Q. That was not the amount you gave back or put back in the machines?

A. Oh, no, in the phonograph if there was a few nickels or dimes I would just give that back.

Q. As to the money that you took out of the machines, that would come out of the cash box?

A. Yes, that would come out of the cash box.

Q. Was that all entered in the book, the amount that came out of the cash box?

A. No, that would come off the top.

Q. What do you mean by that?

A. Well, if there was a $100.00 in the box and if they had a ten or a fifteen dollar pay-out, that would come out first, that would be deducted and then we would sit down and divide the rest.

Q. That is what you are referring to by pay-out? A. That is right.

Q. How often would that occur?

A. Well, sometimes once or twice a week, or whenever I made the collections, it would vary in different places. [331]

Mr. Emigh: I believe you may take the witness.

Cross Examination

Q. (By Mr. Patten): Where are you employed now? A. The North Idaho Sales Company.

Q. Where is your office in town here?

A. At 105 West Sherman.

Q. During 1945 and 1946 what territory did you

(Testimony of Leonard Sherman.)

cover for Mr. McFee? A. Kootenai County.

Q. How many machines did Mr. McFee have in the county in 1945 and 1946?

A. Well, I would say 125 to 150.

Q. In a general way what was the break-down of those machines, what denominations were they?

A. Different ones, mostly nickels and dimes, all coin operated devices.

Q. During those years, how much did the machines average?

A. Well, that is pretty hard for me to answer to each individual machine.

Q. Well, take the five cent machines, in a good location take any five cent machine?

A. Probably $50.00 a week.

Q. How often did you make collections? [332]

A. Once a week, sometimes every two weeks on some of them.

Q. How much would a ten cent machine average in a good location, how much would they take in?

A. Sometimes not as good as a nickel machine.

Q. And what about the twenty-five cent machines, how much would they take in?

A. Oh, $75.00 or $80.00 a week.

Q. The fifty-cent machines what about those, what would they take in?

A. Well, that is another question, sometimes a fifty-cent machine didn't take in anything, it depends on where it was at.

Q. Where was the best location during those years? A. Well, that is hard to say.

(Testimony of Leonard Sherman.)

Q. In 1945 and 1946 did it change or what, generally what was the best location during those years?

A. Well, that I don't remember, no, I don't remember which was the best.

Q. You said 150 machines, was that about an average or did you sometimes have more?

A. Didn't have any more, at least not very many, it generally came down.

Q. Did you have more machines in 1945 or more in 1946?

A. Well, it was pretty close to the same, that is hard to remember.

Q. About how many locations were these machines in; how many [333] locations did you have to serve?

A. That I don't remember either, sometimes a lot or quite a few were in one location and then I had places where there was a dime or a nickel or maybe a nickel and a dime machine in one location.

Q. Will you name the locations that you had, the number of machines in 1945 and 1946?

A. In 1945 and 1946 I don't remember that either, I don't remember where they were.

Q. Where was the best location, that is what I intended to ask?

A. Well, I don't remember where the best location was.

Q. Where in the county here did Mr. McFee have his machines in 1945 and 1946?

(Testimony of Leonard Sherman.)

A. In the beer taverns.

Q. I mean the names of the places?

A. Well he had,—let's see where it was,——

Q. ——Let me say this, take the Last Chance, did he have slot machines there?

A. Yes, sir.

Q. You worked for 12 years collecting from those machines, can't you tell us where the machines were?

A. There was some at Spirit Lake; some at Rathdrum——

Q. ——What places there?

A. Where do you mean now?

Q. Rathdrum, what places?

A. Well, there was also Shady Rests. [334]

Q. The only place in Rathdrum?

A. I think it was Masterson's tavern at Rathdrum, I just don't know if that is correct or not at that time.

The Court: We will recess at this time until 2:00 o'clock.

April 29, 1952, 2:00 o'clock p.m.

Q. Mr. Sherman, when recess was had you were going to list for us the places where Mr. McFee had slot machines and I believe you mentioned Spirit Lake, Shady Rest and a tavern in Rathdrum.

A. That is right.

Q. Shady Rest, do you have any connection with this place? A. Yes.

Q. What is that connection?

POOR COPY

(Testimony of Leonard Sherman.)

A. My mother owns it.

Q. Is there any indebtedness on this tavern?

A. Yes.

Q. To whom is that indebtedness?

A. Mr. McFee.

Q. Do you have a brother? A. Yes, sir.

Q. Just one? A. No. [335]

Q. How many do you have? A. Three.

Q. What are their names?

A. Clarence, Walter, and Frank.

Q. Have your brothers ever been employed by Mr. McFee? A. One of them.

Q. Is that Walter? A. Yes, sir.

Q. For how long?

Mr. Emigh: I have no objection to this examination except that I think it is immaterial and it is not proper cross examination.

The Court: I don't know what the purpose of this is, but he may proceed.

A. I forget just how long he was there but I believe about one year.

Q. When was that?

A. I don't remember when that was, I don't even remember the year.

Q. Would you continue now to name the locations which you worked during 1945 and 1946 where Mr. McFee had slot machines?

A. How can I remember all of those places?

The Court: Mr. Witness, if you don't remember, just say so.

A. I don't remember. [336]

(Testimony of Leonard Sherman.)

Q. You say that he had 150 machines and you can only remember three places?

A. I can remember the places but I can't remember who had them. They changed hands all of the time.

Q. Will you list as many as you can?

A. I can't list those, it is just like I say they are liable to change their names any time; I just can't remember.

Q. Did he have slot machines at the El Capitan?

A. Now you mean?

Q. In 1945 and 1946? A. Yes.

Q. Did he have any slot machines at the Last Chance?

A. Yes, I answered that a while ago.

Q. But you can remember no other places that he had slot machines?

A. I can remember the places but I don't know the names.

Q. Did anyone else work this route besides you?

A. Yes, I had other help.

Q. Did they collect the money out of the slot machines? A. Once in a great while.

Q. During 1945 and 1946 once a week you went around to those places?

A. Sometimes if I was busy I would send one of the other fellows out.

Q. And you can't remember what those places were?

A. Just like I say some of them I do, some were changed all of [337] the time, every time I went

(Testimony of Leonard Sherman.)

around it seemed some changed their names.

Q. Do you have slot machines, or did you at that time at Hauser Lake?

A. I don't remember whether it was that year or when it was.

Q. Would the mention of Woodland Beach refresh your memory?

A. Yes, but I don't remember that.

Q. Would the mention of Glen's refresh your memory or W. J. Matchly?

A. I don't remember names like that.

Q. Isn't it a fact that you had slot machines out there? A. Yes, sir.

Q. You remember that you had slot machines out there?

A. Yes, but I don't remember what year it was.

Q. Do you remember that you didn't have slot machines there in 1945 or 1946?

A. No, I cannot say that, just like I told you before I don't know what year those were there.

Q. You still have machines out at Hauser Lake and at the Woodland Beach Resort?

A. Yes, and phonographs.

Q. And you still go out there once a week but you don't remember that you had slot machines out there? A. Just like I said.

Q. Isn't it a fact that you had an agreement with people that you mentioned for you to report only 40 per cent of the [338] receipts, or for them to report only 40 per cent of the receipts to you and you only to report 40 per cent?

(Testimony of Leonard Sherman.)

A. Will you state that again?

Mr. Purdy: We object to that as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: He may answer.

Q. Yes, I will ask it again. Isn't it true that you had an agreement with the proprietors of the Woodland Beach Resort so that you and they would report only 40 per cent of the receipts from the slot machines? A. Absolutely not.

Q. Are you familiar with the book?

A. Yes, I am.

Q. Did you fill one out for each machine at each location? A. No.

Q. Did you make some record in that book of all the money that you took out of these machines?

A. Yes, sir.

Q. And what did you do with those books?

A. I brought them into the office.

Q. And are they still there?

A. I don't know.

Q. Do you know where they are?

A. No, I do not.

Q. Have they been moved from your office?

A. That I cannot tell. [339]

Q. You are the manager of the place?

A. That is right but I check my books in to the office girl.

Q. Have you seen those books after you turned them in? A. No, sir.

Q. You have no idea where they are?

(Testimony of Leonard Sherman.)

A. They are out of my hands when I turn them in to the girl in the office.

Mr. Patten: I think that is all.

Redirect Examination

Mr. Emigh: May I ask a question or two that I should have asked on direct?

The Court: Yes, you may.

Q. Mr. Sherman, on the term pay-out, we went into that this morning and I don't believe you identified what a pay-out is.

A. A pay-out is if the machine makes a short pay then the proprietor in the location pays that out or when he pays a jackpot and then when I come in I pay that money back.

Q. Then as I understand this machine on the jackpot, or if it didn't pay the cash in full or the full amount of the jackpot then the proprietor pays that? A. That is right.

Q. The proprietor always pays that out? [340]

A. That is right.

Q. And when you make the collection would he give a memorandum of what he paid out?

A. He would have a piece of paper and have it written down so that I would know how many pay-outs there was.

Q. That is money off the top as you said this morning, that reimbursed to him for the pay-outs?

A. Yes, sir.

Q. Was there an even division of the pay-outs between you and the proprietor or was it all taken

(Testimony of Leonard Sherman.)

out of the cash box of the machine?

A. No, if the pay-out amounted to one dollar or to five dollars when we take the cash box out I would give him that amount and split.

Q. You gave him the entire pay-out and then proceeded with the division?

A. That is right.

Q. And would Mr. McFee or the North Idaho Sales Company receive any part of that pay-out?

A. No.

Q. I think you have testified that you were servicing about 150 machines? A. Yes, sir.

Q. What different kind of machines were you servicing, were they slot machines, pin-balls and phonographs?

A. All of them, slot machines, phonographs and free plays. [341]

Q. You have no way of knowing how many of each there were? A. No, sir.

Mr. Emigh: That is all.

Recross Examination

Q. (By Mr. Patten): Have you seen those route slips since you turned them into the office?

A. No, sir.

Q. Are those machines of McFee's set tight or were they loose machines?

A. They were fairly loose.

Mr. Patten: That is all.

Mr. Emigh: That is all.

RICHARD FIELDS

Called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Purdy): Your name is Dick Fields?

A. Yes, sir.

Q. Where do you reside? [342]

A. Wallace, Idaho.

Q. Are you a married man? A. Yes, sir.

Q. By whom are you employed?

A. Mr. McFee and the North Idaho Sales Company.

Q. How long have you been employed by Mr. McFee? A. Since September, 1945.

Q. You have been employed by him since that time? A. With the exception of one year.

Q. What year?

A. That was in 1949 and 1950.

Q. What are your duties with the North Idaho Sales Company?

A. More or less route supervisor.

Q. What do you mean by that?

A. Well I do the ordering of the records for the phonographs and part for the slot machines when we are out of them and I do a portion of the buying, supplies such as title strips and some other equipment.

Q. Do you have anything to do with collections?

A. Yes, sir.

Q. Are you familiar with how they are handled?

A. I am.

(Testimony of Richard Fields.)

Q. Will you just describe to the Court and the jury when you go to a location to make collections what takes place?

A. I start out with the books that contain the accounts, the reports and the keys; I contact the owner or manager; I [343] have the keys for the machines I open it up and open the cash box, dump it on a table and if he has any pay-outs, whether it is a slot machine or a phonograph or what, we take that out first and count the money the gross is entered, and it gives the date and the kind of machine, we put the total amount, the gross take of the machine and then it is divided.

Q. As to the pay-outs, that money is taken out of the machine and given to whom?

A. To the location manager or owner because he took it out of his cash register to pay out.

Q. You have no way of telling the number of pay-outs?

A. All we do is take his word for it.

Q. Who has the keys to those machines?

A. I do, most of the time.

Q. I will ask you whether Mr. McFee ever made collections during the time you were employed?

A. Never.

Q. What do you do with the money after you collect it?

A. I have to check it against my books and I deposit the money myself, the deposit book has to tally with the collections.

Q. You deposit in the bank; you do that?

(Testimony of Richard Fields.)

A. Yes, sir.

Q. You account for the money that is deposited in the bank from the first of July until the 31st of July,—would [344] there be any way that you could check that balance with your records?

A. These books have to tally with every deposit.

Q. When that money is put in the bank to whose credit is it deposited?

A. The North Idaho Sales Company.

Q. Now, Mr. Fields, you will notice on these books, on page number one you will notice a number in red, does that show on the three sheets?

A. That is right.

Q. What happens to be the number on that one?

A. 106-1.

Q. Mr. Fields, that is on there for what purpose?

A. That is put on by the printer so that you can run the books numerically.

Q. The number on the outside written in pen and ink, who puts that on?

A. That is put on in Wallace by the girl that book is charged out to Wallace or Coeur d'Alene office. This book, if it is charged to me my name is there and the number and I am charged with the book and responsible for it until all of that book is filled.

Q. Has there been any occasion when machines would be continually making pay-outs to such an extent that it would be detrimental to the business?

A. There has been such an occasion. [345]

(Testimony of Richard Fields.)

Q. What do you do in a case of that kind?

A. We check it for mechanical failure.

Q. If you find no mechanical failure, what do you do?

A. We pull it out, we take it out of the location for the reason that we figure that we are being taken.

Q. If you find mechanical failure, what do you do?

A. Repair it but if we don't it is taken out.

Q. Has it occurred in your experience as a collector that you have collected any money that you turned over to Mr. McFee directly in cash?

A. Never.

Mr. Purdy: You may inquire,—just a moment, another question.

Q. Just explain that once more on this pay-out proposition.

A. Well, suppose that you were playing a machine and you lined up the oranges and the machine failed to pay 10 coins, you would turn to the owner of the place and ask for full payment, would you not? Then he would turn to his till and pay you the differences that you should have gotten and he will make that out on a tab or on some memorandum and when I come around to check the machine I take that figure, but I see that it is within reason and then I pay the man for the gross receipts. From that time on in the accounting, that is when the division is made.

Q. Would that show on the stub of the book?

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(Testimony of Richard Fields.)

A. There is no reason to show it on the book. [346]

Q. Why?

A. The money belongs to the location and not to us.

Mr. Purdy: That is all, you may examine.

Cross Examination

Q. (By Mr. Patten): Mr. Fields, are you familiar with the Fields Distributing Company of Seattle? A. That is my father.

Q. Are you related to Mr. McFee in any other way than in business?

A. I am married to his step-daughter.

Q. You were the manager during 1945 and 1946? A. Part of 1945.

Q. And all of 1946? A. Yes, sir.

Q. You were the manager of a certain group?

A. Yea.

Q. Will you tell us how many machines Mr. McFee had in or during 1945 and 1946?

A. I cannot say how many he had in 1945.

Q. You were a route manager?

A. Yes, sir.

Q. How many did he have when you were there, how many during the first three months that you were there? [347] A. 250 to 300.

Q. In all of Idaho?

A. No, not all of Idaho.

Q. You had nothing to do other than to collect?

A. Yes, buying supplies and so on.

(Testimony of Richard Fields.)

Q. How many machines did Mr. McFee have in Shoshone County in 1946? A. 100 to 150.

Q. Slot machines?

A. Combination of all, slot machines, phonographs and pin-ball machines.

Q. Would you enter the slots on the books such as Exhibit No. 39 or is that just phonographs?

A. All of the machines.

Q. How many slot machines were there?

A. Around 75.

Q. Did you have a list of the locations where those machines were?

A. We didn't need a list, we knew where they were.

Q. Will you tell the jury and the Court where they were?

A. Well, 23 bars in Wallace and I venture to say that there was one or two machines in every bar.

Q. Did you have any in Burke?

A. A few, two locations in Burke.

Q. And in Mullan? A. About six. [348]

Q. Six machines? A. No, six locations.

Q. How many machines were there in a location? A. Not over two.

Q. How about Kellogg?

A. Didn't have much of an operation in Kellogg, mostly phonographs.

Q. Did you have any slot machines?

A. Two locations.

Q. How many machines in each?

(Testimony of Richard Fields.)

A. Three in one and two in the other.

Q. Did you have any other towns in Shoshone County where there were machines?

A. Not in 1945 or '46, I don't believe.

Q. Did you know all of the slot machines in Shoshone County, to whom they belonged?

A. In 1945?

Q. And also in 1946? A. Absolutely.

Q. Do you know whether Mr. McFee had any personal machines besides those that you serviced?

A. Not to my knowledge.

Q. Do you know that he didn't have any?

A. I would say yes, that he didn't have any.

Q. Do you know that he didn't have any outside of Shoshone County?

A. I cannot tell you about that. [349]

Q. Were slot machines legal in Shoshone County in 1945?

A. As far as the Federal Government was concerned, yes.

Q. As far as the State of Idaho was concerned?

A. I cannot tell whether they were or not.

Q. If you were the manager of the group, you mean that you didn't know whether the business was legal or illegal?

A. I wasn't an attorney and I didn't look up the law.

Q. Do you know whether they were legal or illegal in 1946? A. No, sir.

Q. How about 1947?

(Testimony of Richard Fields.)

A. They were passed in 1947, yes, they were brought out.

Mr. Patten: That is all.

Redirect Examination

Q. (By Mr. Purdy): In 1945 and 1946 it was common knowledge that slot machines were operated in Shoshone County? A. That is right.

Q. Now, in connection with the locations in Kellogg, were there other operators in Kellogg?

A. There were.

Q. And did that account for the number of locations that you had? A. It did.

Mr. Purdy: That is all. [350]

Recross Examination

Q. (By Mr. Patten): You have seen Exhibit No. 39? A. Yes.

Q. When you complete a slip what do you do?

A. I turn them to the office.

Q. Do you know if they are still in the office?

A. To the best of my knowledge they are.

Q. Have you seen them since you turned them in? A. No, I have not.

Mr. Patten: That is all.

Mr. Purdy: That is all, you may be excused.

CHARLES PARSONS

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): What is your occupation, Mr. Parsons? A. Mechanic.

Q. By whom are you employed?

A. The North Idaho Sales Company.

Q. By whom were you employed in 1945 and 1946? [351]

A. The North Idaho Sales Company.

Q. During that entire period or a portion of it?

A. The whole thing.

Q. Were you collecting during that period?

A. I was.

Q. Where were you collecting from?

A. Lewiston, Idaho.

Q. Were you collecting during that entire period? A. I was.

Q. Will you describe to the Court and jury the operation as you did it when you made those collections, what did you do first?

A. When it came regular collection time I would take the book, the report and the keys and start out and go around to each location. I would count the money, divide it up and they would keep their part of it and I took my part of it back to the office and I gave the girl the book and the money when I got back, I would dump the change on the counter and she would count it. It had to check

(Testimony of Charles Parsons.)

with the book, she took the money to the bank afterwards.

Q. You had an office at the North Idaho Sales Company? A. Yes, sir.

Q. You turned the collections and the book into the office girl? A. Yes, sir.

Q. In connection with the division of the money, how was that [352] handled, the money that was taken out of the different machines?

A. Just going over what these other fellows have said; if there was any pay-outs it came off the top and then we split.

Q. The pay-outs would be the money the proprietor had paid for either jackpots or when the machine didn't pay or where the machine failed to pay full amount when a winning combination showed on the dial, where it didn't pay at all or where the pay was short? A. That is right.

Q. That money would be paid to the location?

A. Yes, sir.

Q. That is if the machine didn't pay?

A. Yes, sir.

Q. The location man would be reimbursed for what he had paid out? A. Yes, sir.

Q. Was all of the money divided then?

A. Yes, sir.

Q. Was he given anything to show that he had received a division on that money?

A. We had a collection book and his copy was an indelible copy.

Q. Just one copy was given to him?

(Testimony of Charles Parsons.)

A. Yes, sir.

Q. One copy and the tissue was kept?

A. Yes. [353]

A. A single copy was kept in the book?

A. Yes, sir.

Q. Would he sign the book when you paid him?

A. Yes, we both signed.

Q. When you made the collections was all of the money distributed that was in the cash box?

A. That is right.

Q. After the deductions were made and you distributed or divided the money, that was shown in the book? A. It was.

Q. And you turned those in, the book and the money in the manner that has been described here?

A. That is right?

Q. Did you ever pay any money directly to Mr. McFee before it was turned into the office?

A. No, sir, I didn't.

Q. Who had the keys to the machines?

A. I did.

Mr. Emigh: That is all, you may examine.

Cross Examination

Q. (By Mr. Rossi): Mr. Parsons, you stated that the pay-off consisted of short pays and jackpots?

A. There are several ways that you could be short, take a [354] phonograph and if they put a quarter in and it plays only tune then of course, they holler for their 20 cents, it is not our money,

(Testimony of Charles Parsons.)

it belongs to the machine, or rather to the manager of the location.

Q. In connection with slot machines the jackpots are in the machine or rather they are in until paid? A. Yes, sir.

Q. Any pay-offs that come from slot machines or rather for the slot machines were purely where the coins were short? A. That is right.

Q. It would be a very small part of the take of the machine?

A. That is right, sometimes not any.

Q. So jackpots were not taken out of the cash box? A. That is right.

Q. When you turn these slips into the office, did you deposit the money yourself?

A. No, the girl did that.

Q. Then you don't know of your own knowledge whether or not the money you turned into the office was actually deposited? A. Yes, I do.

Q. What do you mean when you say you do?

A. We send the slips to Wallace, to the head office.

Q. Since returning the receipts to the office, have you had occasion to examine them, the receipts in the books, have you examined them or have you had occasion to see them again? [355]

A. No, sir, I have not.

Q. Do you know whether they are in the Lewiston office?

A. No, they went to the Wallace office.

Q. Do you know where those are kept?

(Testimony of Charles Parsons.)

A. No, sir, I don't.

Q. Did you have access to the safe in the Lewiston office? A. Yes, sir.

Q. Was any money kept in that safe?

A. None other than the collections that I had.

Q. What collections you made?

A. Yes, sir.

Q. Who had access to the safe?

A. I did and the office girl, also.

Q. Did Mr. McFee have the combination to that?

A. No, sir, he didn't.

Q. How do you know that?

A. In my mind he does not have it.

Q. But he may have?

A. I don't think so.

Q. But you don't know whether he had the combination to the safe or not?

A. No, sir, I don't know.

Q. Do you know whether he kept any personal money in that safe?

A. Not in there, no, sir.

Q. No packages or containers with money in that safe belonging to Mr. McFee?

A. No, sir, nothing. [356]

Q. During 1945 or 1946?

A. No, sir, none, that is right.

Q. Have you ever been convicted of a felony?

A. No, I have not.

Mr. Purdy: Now we object to the remarks of counsel, unless he has some reason for bringing that up.

The Court: He has answered.

Mr. Rossi: That is all that we have.

Mr. Emigh: No further examination.

LUCILE DOLAN

Called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Where do you live, Miss Dolan? A. Coeur d'Alene.

Q. How long have you been a resident of Coeur d'Alene? A. Eight and one-half years.

Q. What is your occupation?

A. Working for the North Idaho Sales Company in the office.

Q. What work do you do?

A. Take care of the records, bookkeeping, make the bank deposits and take care of the telephone. [357]

Q. You speak of making bank deposits, who do you make those for?

A. For the North Idaho Sales Company now but I formerly did for the Foresters Club.

Q. From whom did you receive the money that you banked? A. From the collectors.

Q. When you received that money what did you receive with the money, if anything?

A. The collection book.

Q. In case of the coin operated machines, did you receive the book with those collections?

A. Yes, sir.

(Testimony of Lucile Dolan.)

Q. And is that book checked against the amount of money that you received? A. Yes, it is.

Q. And did they or do they correspond?

A. They have to before we make the deposit.

Q. When you receive any money that is not collected from the coin operated machines, what kind of evidence do you receive as to the amount of money that is turned in?

A. I don't understand just what you mean.

Q. In the case of coin operated machines, do you get a book like Exhibit No. 39? A. Yes, sir.

Q. Suppose the proceeds of the Foresters Club are turned in—the money from the club aside from that which comes from [358] the coin operated machines——

A. ——You mean what is taken from the cash register?

Q. Yes, or whatever it is.

A. We get a daily report with that.

Q. And do those daily reports show the amount of money that you deposit?

A. How much is taken in and about twice a week I deposit it in the bank.

Q. How often did you make deposits?

A. For the Foresters Club or the North Idaho Sales Company?

Q. Well, for the North Idaho Sales Company?

A. When a collection is filled, we might make it in two weeks, or it might be every week, the collection book has to balance with the money, or the

(Testimony of Lucile Dolan.)

amount taken in has to balance with the collection book.

Q. That is not under a daily deposit system?

A. No, sir.

Q. You might hold those collections for some time.

A. Yes, it might be a week or two.

Q. And it might be more than that, longer?

A. Yes, in the winter it might be.

Q. Does the deposit which you make from other sales or other money than collections from the coin operated machines check with the cash report or daily report which you receive with it?

A. Yes, sir. [359]

Q. And that includes the cash register tape?

A. Yes, sir.

Q. What have you to do with paying out the money there? A. What do you mean?

Q. I mean do you draw checks?

A. Not at the North Idaho Sales Company, but at the Foresters Club I did, I paid the help.

Q. You paid the employees of the Foresters Club? A. I did at that time, yes, sir.

Q. Would you draw checks for any other purpose or purposes? A. Yes, sir.

Q. In this office where you are I understand there are a few thousand records, phonograph records? A. Yes, sir.

Q. Is that a part of the business, to deal in those?

A. Yes, we have them for our machines.

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(Testimony of Lucile Dolan.)

Q. And what do you do in regard to those records?

A. I pick out the records for the locations and I type the title strips.

Q. And did you pay for those records?

A. They are paid for in Wallace and sent to us.

Q. Did you have occasion to pay out money for other purposes?

A. Not for the North Idaho Sales Company.

Q. Other than the payroll?

A. I didn't pay off the payroll for the North Idaho Sales Company. [360]

Q. For the Foresters Club?

A. Yes, I did for the Foresters Club.

Q. Have you any recollection of having been directed by anyone to pay off money for Mr. Sonduck in the spring of 1945?

A. Well, I have a note on the stub where I gave him $2,000.00 for Mr. McFee and that Mr. McFee reimbursed me for it, I gave him a note.

Q. What money was that paid out of?

A. The money for the collections, Mr. McFee called and asked us to give it to him.

Q. At whose direction was that given out?

A. Mr. McFee's.

Q. Was it replaced by Mr. McFee?

A. Yes, sir, it was.

Q. Was that before you made the deposit?

A. We had to get it back before we made the deposit.

Q. Mr. McFee replaced that out of personal

(Testimony of Lucile Dolan.)

funds? A. Yes, sir.

Q. And the replacement of that amount was not out of the North Idaho Sales Company funds, so far as you know? A. No, it was not.

Q. Do you have any recollection of a considerable amount of whiskey being delivered to the North Idaho Sales Company in the years 1943 and 1944?

A. Never to the North Idaho Sales Company.

Q. Who was the liquor delivered to, if you know? [361] A. To the Foresters Club.

Q. The North Idaho Sales Company had nothing to do with it? A. Absolutely not.

Q. Do you know or did you know the amount of that? A. I don't know.

Q. Do you know how it was distributed?

A. A part to the Foresters Club at Lewiston and a part of it to this Foresters Club and a small amount to the Gem Club at Athol.

Q. As it was distributed to the Foresters Club, that part, do you know how it was paid for?

A. In cash, as they used it the money was taken out of the register or by check.

Q. Did that money go to the North Idaho Sales Company? A. No, sir.

Q. To whom did it go? A. Mr. McFee.

Q. You have no knowledge of the amount of it?

A. No, because it was at different times.

Q. Was it for considerable amounts?

A. Yes, sir, it was.

Q. That was generally the way it was handled?

A. Yes.

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(Testimony of Lucile Dolan.)

Q. And when it was available it was for the supplying of the Foresters Club?

A. Yes, sir. [362]

Q. Do you know when the Gem Club closed?

A. I think it was in 1945.

Q. Was it early or late?

A. I don't know but I would say it was late, I would say it was late in the year 1945 but I am not sure.

Q. You would not be positive about that?

A. No, I am not positive.

Q. The testimony here indicates that the collectors turned in money to your office and that the Foresters Club turned in money to your office, was all of the money deposited in the bank that you received from those sources? A. Yes, sir.

Q. And is that on your records?

A. Yes, sir, that is right.

Mr. Emigh: You may take the witness.

Cross Examination

Q. (By Mr. Patten): Now, Miss Dolan, when did you go to work for the North Idaho Sales Company? A. In September of 1943.

Q. What did you do prior to that time?

A. I came from St. Paul.

Q. What was your occupation?

A. I worked for the Mayflower Distributing Company, they distribute [363] phonographs and such.

Q. Is that the business with which Tom Terran

(Testimony of Lucile Dolan.)

and Herman Pastor are connected?

A. Yes, sir.

Q. How long were you with the Mayflower Distributing Company?

A. About three years, I believe.

Q. What did you do prior to that time?

A. Well, I worked for Montgomery.

Q. What kind of business is the Mayflower Distributing Company?

A. Distributors for Wertzler and Bally Company, manufacturer of pin-ball machines and the Mills Company of Chicago, they handled phonographs and these others.

Q. What does the Mills Company manufacture?

A. Slot machines and phonographs.

Q. We discussed Exhibit No. 39 here, which is the collection book, did you receive those collection books from the machines in Coeur d'Alene?

A. Yes, and the collections.

Q. Yes, the collections and the books?

A. Yes, sir, they were turned over to me.

Q. What did you do with them?

A. I checked them to see that the money corresponded with the books and I sent the book with the bank deposit slip to Wallace, Idaho.

Q. Have you seen them since that time? [364]

A. No, sir.

Q. Is there a safe in your office?

A. Yes, sir.

Q. Who has the combination of that safe?

A. I have one and Mr. Sherman has one.

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(Testimony of Lucile Dolan.)

Q. Does Mr. McFee have the combination?

A. No, sir.

Q. Are you positive?

A. Yes, we had the combination changed and it was given to me and no one else has it.

Q. When did that happen?

A. Probably in 1944, it was in 1943 or 1944.

Q. Did Mr. McFee have any personal funds in this safe? A. No, he hasn't.

Q. Did he ever ask you to keep money for him?

A. Not to my recollection.

Q. What was your position with respect to the Foresters Club? A. I was bookkeeper.

Q. When were you bookkeeper?

A. I beg your pardon?

Q. Was that in September of 1943 that you became bookkeeper?

A. I think I didn't start until January, 1944, to keep its books.

Q. You testified that while you were the bookkeeper of the Foresters Club that the Foresters Club made payments to Mr. McFee for liquor? [365]

A. That is right.

Q. Were those payments in cash or by check?

A. Part cash and part by check, I cannot say which was the most, it would depend on how much cash we had on hand. If we wanted to pay for some liquor and there was enough money in the bank, I wrote a check, if it was a smaller amount we usually paid it in cash.

Q. How did you pay the other bills, for mer-

(Testimony of Lucile Dolan.)

chandise and wages? A. All by check.

Q. Those particular purchases that you paid by currency, did you enter that in the books?

A. Yes, sir.

Q. Was that through the purchases?

A. Yes, sir.

Q. What was the reason that this transaction was handled, the one I mentioned, any differently than the others?

A. I don't know of any particular reason why it was done that way, there was no special reason, but if anything would go into the storage room there would be a certain amount needed and when I checked the goods out I would take that amount out, it was put in an envelope.

Q. Let me ask, did you pay any other bills in currency?

A. All of the liquor bills, all of the liquor at the liquor store was in currency.

Q. Besides liquor was there any other bills that you paid in currency? [366]

A. That is all that is shown on the daily report.

Q. Those payments were not only in 1944?

A. Possibly all through the years, at different times as they used the liquor.

Q. And were paid to Mr. McFee?

A. Yes, sir.

Q. Have you any idea of the total amount of those payments?

A. No, it would depend on the amount they used.

Q. Would that be in your books? A. Yes, sir.

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(Testimony of Lucile Dolan.)

Q. In the Foresters Club's books?

A. Yes, sir.

Mr. Patten: I believe that is all.

Redirect Examination

Q. (By Mr. Emigh): The North Idaho Sales Company had nothing to do with the liquor account? A. That is right.

Q. And your knowledge comes from being bookkeeper for the Foresters Club, that is, your knowledge of that liquor?

A. That is right, yes, sir.

Mr. Emigh: That is all. [367]

Recross Examination

Q. (By Mr. Patten): You started to work in September of 1943 for the North Idaho Sales Company? A. Yes, sir.

Q. You became associated with the Foresters Club in January, 1944.

A. I think that is correct, if that is the Foresters Club in Coeur d'Alene.

Q. Yes, let me ask you, are you certain of those dates? A. I think it was in January.

Q. And did you have access to the books of the Foresters Club? A. I took care of them.

Q. Do you have access to them now?

A. No, those books were sent to Wallace when the club was closed.

Q. You do not have access to them now?

A. No, sir.

(Testimony of Lucile Dolan.)

Q. Isn't it a fact that the checks to Mr. McFee which you mentioned, I believe they were checks numbered 653, 750, 753, and 756 all dated August 2, 1943, which were cashed, totaled the amount of $17,550.78?

A. I wasn't there at that time.

Q. You testified that you paid Mr. McFee the money. A. Not in 1943.

Q. You didn't say that you paid him the money?

A. I didn't say that I paid for 1943, I said that some was paid by check and it would have to be in 1944. [368]

Q. And what did you pay that with?

A. Foresters Club funds taken from the bar.

Q. And those payments were entered in the books?

A. That is right, from the daily report and entered in the books.

Q. Do you have any idea of the amounts?

A. No, it would be different amounts at different times as they used that liquor.

Q. Did you draw a check and get the cash or did you take the cash out of the till?

A. Out of the till and charged it to liquor.

Q. And entered it in your books?

A. That is right.

Mr. Patten: That is all.

Redirect Examination

Q. (By Mr. Emigh): At the time you spoke of getting the liquor could it be purchased by check anywhere else.

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(Testimony of Lucile Dolan.)

A. No, it could not, it couldn't even be purchased by check at the liquor store.

Q. Not even at the liquor store?

A. That is right.

Mr. Emigh: That is all.

Mr. Patten: No further questions. [369]

JOHN N. NEWLAND

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): What is your business or profession? A. Certified Public Accountant.

Q. How long have you been such?

A. For nine years.

Q. Where do you reside?

A. Butte, Montana.

Q. Do you maintain an office there?

A. Yes, sir.

Q. With whom are you associated?

A. With Mr. E. R. Blinn.

Q. Do you maintain a branch office?

A. We are connected with an office in Missoula.

Q. Have you made any endeavor to determine what investments were made by Mr. McFee in the years 1927 and 1928, if any in stocks?

A. I have.

Q. You made an investigation to determine what if any investments in stocks by him in those years? A. I have. [370]

(Testimony of John N. Newland.)

Q. What effort did you make?

A. Mr. McFee informed me that he had considerable investments in 1927 and 1928 and that the stocks were purchased through stock-brokers in Wallace, therefore, I determined how many stock brokerage firms there were in Wallace and I found that only one of several that existed at that time, according to information which was supplied to me which was still operating under the name Pentulana Company.

Q. Are the present Pentulana people the same people that had the company—strike that, is the Pentulana Company composed of the same people now as in 1927, are they the same ones?

A. I don't think that they are.

Q. Did you endeavor to get stock books from them?

A. I learned that the books for the years 1927 and 1928 were in a basement and I endeavored to get them to give me permission to look for those books.

Q. Did you get permission? A. Yes, sir.

Q. And did you make a search?

A. Yes, sir.

Q. And did you find those old books?

A. Yes, sir.

Q. Did you make inquiries as to the persons that kept those books at that time?

A. No, I didn't.

Q. Did you make any inquiry for them? [371]

A. No, I didn't.

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(Testimony of John N. Newland.)

Q. The books which you have, which you found, are in your poossession? A. Yes, sir.

Q. And have they anything in them to identify them as the books as the Pentulana Company?

A. This one has a stamp Alexander Pentulana, Wallace, Idaho.

Q. Did you find similar or other evidence on other books?

A. I found evidence on these (indicating).

Q. You may state whether those books have the appearance of being old books and if they had such appearance when you found them?

A. They do and they did.

Q. What records did you find?

A. The cash book and the day book, those are day books.

Q. What have you to say as to whether the records you found in the day book are reflected into the cash book?

A. I checked some into the cash book.

Q. It is your belief that those are genuine records? A. It is.

Q. I ask you to refer to those books and ask if you can find a record of a purchase of stock by Mr. McFee during the period that I mentioned.

Mr. Rossi: I object to this, the books are not identified by any officer or agent of the Pentulana Company or any one in possession of these books and we object until they [372] are identified.

The Court: At present I will sustain the objection.

(Testimony of John N. Newland.)

Q. Did you ascertain who the present managers of the Pentulana Company are or that they are not the same persons who had that company back in 1924, '25, '26, '27, and '28?

A. The owners were not the same.

Q. The present owners could not identify the books?

A. They could not identify the books.

Q. From whom did you get permission to look in the basement?

A. Permission was obtained from—I forget the name now.

Q. Was she the lady that owned the building?

A. I think she owned the building and at one time was interested in the Pentulana Company.

Q. Was that Mrs. Kingsbury?

A. Yes, sir, it was.

Q. And with permission from her you did obtain those books?

Mr. Emigh: I think that is sufficient identification, if the Court please.

The Court: Have you examined those books?

Mr. Rossi: No, we have not.

The Court: Only the party or parties who made the entries in the books could identify those entries, or someone who was familiar, no one here or offered as a witness yet could say the entries are genuine and I might say in advance of the questions that I think you are going to ask, I cannot see how they are material. I will let counsel for the Government

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[373] examine the books and I will take the question under advisement at this time.

Mr. Emigh: May I suggest that I would like to call Mr. Blinn to the stand for a minute.

The Court: Very well, you may do that.

E. R. BLINN

Called as a witness by the defendant, after being first duly sworn, testifies as follows.

Direct Examination

Q. (By Mr. Emigh): Will you state your business, profession or occupation?

A. Certified Public Accountant, a member of the firm Newland and Blinn.

Q. What training have you had in that line?

A. Public accounting work for 30 years and a half out here and a year and one-half in Chicago.

Q. What education do you have?

A. A Bachelors and Masters degree from Northwestern.

Q. Are you certified as an accountant in Montana? A. Yes, sir.

Q. And in Illinois? A. Yes, sir.

Q. I will ask you in connection with an endeavor to find [374] stockholdings of Mr. McFee prior to the year 1936 and for some years prior thereto if you took part in a search with Mr. Newland as he has referred to it? A. Yes.

Q. Before doing that did you get permission from a lady to go into a basement in the old office of the former Pentulana Company?

(Testimony of E. R. Blinn.)

A. I had someone that knew her get permission and I might say I got permission through Mr. McFee and Mr. Emasio, they contacted Mrs. Kingsbury.

Q. You got that permission? A. Yes, sir.

Q. Did you ascertain that there were people available who had any charge of those books and made any entries?

A. They said that the people who kept the books were, so far as they knew deceased. Mrs. Kingsbury stated that she didn't know about the business activities.

Q. Did she indicate that——

Mr. Patten: ——Now just a moment, I think that is quite objectionable——

Mr. Emigh: I will withdraw that.

Q. It was on this information that search was made and books found? A. Yes, sir.

Q. What have you to say as a certified public accountant as to your opinion that these books are genuine? [375]

A. The books are genuine, they are records of the Pentulana Company for that period.

Mr. Patten: I move to strike that as his opinion without evidence to support it.

The Court: I will let the answer stand. What years were these books for, that is what years do they refer to?

Mr. Patten: I understand that it is for '27 and '28.

(Testimony of E. R. Blinn.)

Q. Do these books include the unhappy year of 1929?

A. Yes, they include 1929 and 1930, I think they go from 1924 to 1931.

Mr. Emigh: That is the period covered by this Company as it existed then.

The Court: You may show the books to Counsel for the Government and at this time I will take a ten minute recess.

April 29, 1952, 2:45 o'clock p.m.

The Court: The Court is satisfied that a proper foundation has not been laid in regard to the books. In addition to the fact that it is so remote in time that it cannot have any bearing on the question presented here, being practically 10 years prior to any time mentioned in this case.

Mr. Emigh: May I identify this, which we deem [376] material for the record. We propose to offer this in evidence so that the record will disclose what we are talking about, and I will call Mr. Newland.

JOHN N. NEWLAND

Recalled as a witness for the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Mr. Newland have you examined the records of the North Idaho Sales Company for the years 1945 and 1946 as to the re-

(Testimony of John N. Newland.)

ceipts from phonographs and other coin operated machines and for the gross receipts?

A. Yes, sir.

Q. That included all of the receipts?

A. I have examined the records; what do you mean by "including all of the receipts".

Q. Of the North Idaho Sales Company for that period? A. Yes, sir, I have.

Q. Have you made a listing of them, your conclusions after the examination? A. Yes, sir.

Q. Do you have a statement there of it.

A. Yes, sir. [377]

Mr. Patten: I shall object, the books are not in evidence and the books are the best evidence.

The Court: Is that the exhibit that you propose?

Mr. Emigh: Yes, in connection with the examination of the books.

Mr. Patten: My objection is general, it is that the books are in their possession and when we made a computation they had the books to check our exhibits.

The Court: You may have this witness testify from all of the records in Court and if there were other records that he compiled this tabulation from, they should be here also.

Mr. Emigh: Do you have—let me ask this question.

Q. Do you have those records in Court?

A. Not in Court but they are available.

The Court: You may make your offer of proof if you care to Mr. Emigh.

(In the absence of the jury.)

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(Testimony of John N. Newland.)

Mr. Emigh: I would like to have each book marked a separate number, I am not sure what the numbers would be.

The Clerk: 56 and 57.

Q. Will you take the first numbered exhibit, is that the book which you found in the basement—strike that please—let me ask you Mr. Newland, is the book which you have in your hand one of the books which you found in the basement of the old office of the Pentulana Company which you testified that in your opinion is a genuine record of that company operated back in the years mentioned, over the period from 1924 I believe you said to 1931?

The Court: Are you in possession of those records—Mr. Emigh, let me ask you, will you state what you intend to prove now in the absence of the jury?

Mr. Emigh: To make my position clear I was asking the questions, I understood that the Court was having the record made.

The Court: I have a rule on that and I suggest you make a statement as to what you intend to prove by these exhibits. If you will make your statement into the record then the Court will see what you have in mind.

Mr. Emigh: We intend to prove the exhibit which we have now had identified, which were found by the witness under the circumstances detailed by him. This Exhibit Number 56 and the other Number 57 and we intend to prove in the

(Testimony of John N. Newland.)

years 1927 and 1928 a considerable amount of stock —we have the compilation made from these books.

The Court: Just tell us what you expect to prove.

Mr. Emigh: In the years, these two years that Mr. McFee bought and sold stock and after investments and after sales made in 1928 he had $12,000.00 and some odd dollars.

The Court: What page of the record do you expect to show this from?

Mr. Emigh: We offer the exhibit in evidence it is [379] confined to the years 1927 and 1928 and possibly early in 1929.

Q. What page or pages of the two books from which this information is obtainable, can you tell us that?

A. I don't have a listing of the pages but I do have the dates.

The Court: You may give me the dates, you are assisting counsel by doing that.

A. December 8, 1927; January 25, 1928; January 26, 1928; January 27, 1928; February 16, 1928; March 16, 1928; March 17, 1928; May 2, 1928; July 10, 1928; February 27, 1929; February 28, 1929; March 6, 1929; March 14, 1929; March 18, 1929; February 14, 1928; February 15, 1928; July 10, 1928; and October 1, 1928.

The Court: The offer of proof will be denied, the ruling of the Court will be restated at this time, if you can connect this matter up with anyone who can testify as to the correctness of this record,

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(Testimony of John N. Newland.)

in other words, anyone that has knowledge of these transactions. If you have a witness that has knowledge of these transactions so that they can be properly identified then perhaps this would be admissible.

Mr. Emigh: May I most respectfully make a suggestion to the Court?

The Court: Yes, indeed you may.

Mr. Emigh: Is it possible that the ancient documents rule has not been considered by the Court?

The Court: It is possible that I have overlooked that and I would like to have any authorities that you may have on the question any authorities that you care to submit. We will recess at this time until 10 o'clock tomorrow morning.

April 30, 1952, 10:00 o'clock a.m.

The Court: I advised counsel before the adjournment that I would reconsider the offer of proof on the part of the defendant. I suggested that if counsel for defendant had any authorities they should furnish them to the Court. I have looked into the matter very carefully myself and it is very apparent that the witness, in fact neither witness who was placed on the stand to make this proof have any personal knowledge in connection with the dealings as is said to be shown on the books. It is apparent that these entries were made some 16 years before the time of the present charge in this indictment and it is also apparent that the defendant has witnesses or at least one witness who has

(Testimony of John N. Newland.)

personal knowledge of this transaction. I don't think that we can prove book entries by going in through the back door, even if it was material. If it is material the party is here and in a position to testify. In this case the court knows that one of the parties mentioned is here [381] and should know how the entries concern the present case. I will follow the ruling that I made yesterday and refused the offer of proof.

(Remarks of Court and counsel reported but not transcribed.)

(The following had in the presence of the jury, Mr. Newland recalled.)

Q. Yesterday you were questioned as to a computation that you prepared from the books of the North Idaho Sales Company as to the gross income for the years 1942 to 1946? A. Yes, I was.

Q. Do you have the books with you there, the books from which this computation was prepared?

A. Yes, sir.

Q. Have you the computaton, I believe it is Exhibit 55? A. Yes.

Mr. Emigh: I will ask that it be shown to counsel.

Mr. Patten: May I ask the purpose of this exhibit?

Mr. Emigh: It is to clarify the evidence like any other evidence in this case; to establish facts as shown by the books—it is to clarify the books as they existed.

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(Testimony of John N. Newland.)

Mr. Patten: If this is introduced to establish the validity of these figures I object to it now. You have had some eight or nine witnesses that have testified here as to contents in exhibits similar to Exhibit 39 we have had none of the exhibits. If it is for the purpose of showing what is in some other book or books we shall object to it. [382]

Mr. Emigh: It is offered to show what the books reflect.

Mr. Patten: It says slot machines. I listened to witnesses tell what was in books such as Exhibit Number 39, now if it is to show the correctness of those figures I shall object.

The Court: In other words, he has no objection to the admission to that exhibit as showing what the books show without admitting the correctness of it.

Mr. Patten: I will take your word that those are the figures, but if those figures are for the purpose of showing what is in the book but if it is to show the correctness then I object.

Mr. Emigh: It is for the purpose of showing what is in the books.

The Court: It may be admitted for that purpose only.

Q. Is that a correct computation of the items purported to be shown on it and as shown in the books of the North Idaho Sales Company?

A. Yes, sir.

Q. Will you read the items that appear there

(Testimony of John N. Newland.)

for the respective years and the total, or the gross income?

A. The year 1942, slot machines commissions $169,307.89; phonograph commissions, $30,186.86, total $199,494.75. For the year 1943 slot machine commissions $173,144.48, phonograph commissions, $38,969.08, total $212,133.56. [383] For the year 1944 slot machine commissions $140,405.95, phonograph commissions $54,761.18, total $195,167.13. For the years 1945 slot machine commissions $191,446.83, phonograph commissions $47,865.97, total $239,-312.80. For the year 1946 slot machine commissions $246,469.77, phonograph commissions $50,-209.91, total $296,679.68.

Mr. Emigh: I think that is all, you may examine.

Cross-Examination

Q. (By Mr. Patten): How long have you been associated in this case?

A. I think about 18 months.

Q. You have had Mr. McFee's books all of that time? A. No, sir, we haven't.

Q How long have you had McFee's books?

A. Upon occasions, not for long periods of time.

Mr. Patten: May I use the blackboard in the cross-examination of this witness?

The Court: Yes, you may do that.

Q. Taking this exhibit, from 1942 to 1946 the list pertaining to slot machines as you read them in the column on the left hand side. The first figure is 1942.

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(Testimony of John N. Newland.)

A. The commissions amount to $169,307.89.

Q. That is slot machine commissions?

A. Yes, sir. [383]

Q. And the year 1943 and on through 1946?

A. $173,144.48; $140,405.95; $191,446.83; $246,-469.77.

Q. Now, just make the figures small on the left to keep this straight. You have Exhibit Number 6?

A. Yes, sir.

Q. Will you find on there how much tax Mr. McFee paid on the slot machines in 1942?

A. The taxes that he paid on the slot machines?

Q. Yes, that is the license fees on slot machines, it is listed under taxes, I think the figure is about $18,000.00. A. What is the question.

Q. The figure that is shown on the return on coin operated machines, the tax?

A. $18,443.30.

Q. Now will you write that on a piece of paper?

Mr. Emigh: I think, if it please the Court, this is improper cross-examination. This is a matter that was not gone into on direct examination, he testified from items on the books. If he wants to make him a Government witness that is different.

The Court: The answer may stand.

Q. If Mr. McFee had four slot machines to one juke box on each operation and the annual tax on the slot machines is $100.00 and the tax on each juke box is $10.00, how many slot machines would Mr. McFee have in 1942?

Mr. Emigh: We object to that as not based on

(Testimony of John N. Newland.)

evidence [384] from which the witness is testifying nor evidence in the record. It is speculative and it is a hypothetical question and not proper cross-examination.

The Court: You put him on the stand as an expert.

Mr. Emigh: To identify certain figures and nothing else; he did identify them and his examination was on those figures, I think it is not proper to examine outside of the questions put on direct examination. If counsel proposes a hypothetical question it does not take in the evidence in the record and is wholly improper as cross-examination.

The Court: It is quite questionable in my mind whether I should have admitted the testimony in the first place, however, I did admit it and now I will permit the Government to examine in every particular in regard to it. He may answer.

A. The license on slot machines is how much.

Q. $100.00.

A. You are guessing how many machines in each location?

Q. I am taking the figure of four slot machines to one juke box.

A. The juke box license is how much?

Q. $10.00. A. I see.

Q. Will you compute how many slot machines tax were paid in 1942, that is taxes on how many slot machines?

A. You say that each location has four slot machines and one juke box? [385]

Q. Four slots and one juke box.

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(Testimony of John N. Newland.)

A. You don't want it to the penny?

Q. No, not that close.

A. 45 locations and apparently four slot machines in each location would be 180 machines, 180 times 100 would be $18,000.00, one juke box in each location, 45, 45 times 10, I can get within $6.40 is that close enough?

Q. How many slot machines does that indicate?

A. 180 slot machines.

Q. Will you put that right by 1942.

A. Yes.

Q. Now, you have been handed Exhibit Number 7, what is the figure of taxes paid on coin operated machines for the year 1943 according to that exhibit which is Number 7. A. $38,107.02.

Q. Will you make a similar computation on that year? A. I have it.

Q. And what figure do you arrive at?

A. 372.

Q. Will you put that on the blackboard. Now, you have been handed Exhibit Number 5, do you find the figure on the taxes paid for that year which is 1944 on the coin operated machines?

A. $50,772.46.

Q. Will you make a similar computation and tell us figure you arrive at? [386]

A. 496.

Q. Will you put that figure opposite the year 1944. You have been handed Exhibit Number 1, will you read to the jury the tax paid on coin operated machines for that year, which is 1945?

(Testimony of John N. Newland.)

A. $48,906.36.

Q. Will you make a similar computation?

A. I have it.

Q. What figure do you arrive at? A. 480.

Q. Now you have that figure on the blackboard would you take Exhibit Number 2 and do the same thing and tell us what figure you arrive at?

A. 556.

Q. Do you have the depreciation record and schedules with you of the North Idaho Sales Company?

A. The schedules would be in the tax returns.

Q. With a smaller figure will you take the returns and put the net income of the North Idaho Sales Company on that side (indicating)?

A. I don't understand.

Q. The net income for the years 1942, 1943, '44, '45 and '46? A. Where do I get it from?

Q. From the tax returns—did they agree with the books?

A. It has been testified that they do.

Q. You can get it from the tax returns, the net income from [387] the business.

A. 1942, $126,107.69; in 1943, $106,396.62; in 1944, $15,582.27; in 1945, $48,644.44——

Mr. Emigh: May I ask counsel if it his intention to impeach the bill of particulars?

Mr. Patten: Only to establish the facts as alleged in the indictment.

Mr. Emigh: You set out in the bill of particu-

(Testimony of John N. Newland.)

lars that the income tax returns and the books coincided.

Mr. Patten: We agreed to that.

Mr. Emigh: This is not to impeach the books in that respect.

Mr. Patten: It is not for that purpose.

Q. Now what about 1946?

A. 1946, $82,873.12.

Q. From the records that you produced can you tell me how many new slot machines Mr. McFee purchased in 1942?

A. Could I tell how many?

Q. Yes, how much of his funds he spent for slot machines in 1942?

A. Where do I get the figure from?

Q. Well you have the tax returns and it shows the depreciation does it not?

A. Do you want the amount spent?

Q. Yes, the amount spent.

A Are you going to ask for the other years also? [388]

Q. Yes I am.

A. Then I will get it now while I am getting the figure for 1942.

Q. Very well and can you put it in the proper year on the blackboard?

A. 1942, $39,924.22; 1943, $5,763.23; 1944, $16,932.95; 1945, $3,510.90; 1946, $35,049.20.

Q. You examined the books, can you tell what the average cost of slot machines are, roughly?

A. I don't know.

(Testimony of John N. Newland.)

Q. He purchased a great many slot machines?

A. I gave my answer on that.

Q. And what is that?

A. I have no objection to answering the question but I don't know.

Q. He purchased a lot of machines?

A. It shows what he bought.

Mr. Emigh: We object to this examination, the witness was not examined on this matter on direct examination.

The Court: If it does not show on the books the objection is sustained.

Q. Assuming Mr. Newland that a slot machine cost $300.00——

Mr. Emigh: We object to a hypothetical question not based on the evidence and the record in the books.

Mr. Patten: The price or rather the purchase of slot machines is shown in the cancelled checks.

The Court: If they are in the books, but if the books don't show the average cost of slot machines and if you say it is not in the books then you can't answer the question.

A. May I explain, the average cost of slot machines means nothing in auditing a set of books, when I am auditing, the average cost means nothing.

The Court: But if it is in the books, you may inquire about that.

Q. Is it?

A. The average cost of any machine?

(Testimony of John N. Newland.)

Q. Have you seen an entry of one machine?

The Court: This man is an expert and it seems to me if it is not there he can say so.

A. I have said no.

Q. Assuming, Mr. Newland $300.00 as the cost of a machine, will you figure out how many machines were purchased?

Mr. Emigh: We object to assuming any specific cost as not being in the record, if he is basing a hypothetical question it is on a figment on the imagination and I object to it.

The Court: If it is in the books of course it could be determined and he might testify, if it is not then of course there is nothing to base this on.

Q. Will you take each year and explain the history of the North Idaho Sales Company, the receipts from machines, how many machines there were and the net profit from the business and [390] they spent for new machines, buying machines?

A. Yes, in 1942 the commissions from slot machines to the North Idaho Sales Company totaled $169,307.89; that is the gross and out of that you must take the expenses on that, during the year, based on the assumption of the number of slot machines in each location and so forth. The number of machines according to the license tax paid would be 180 so he would have 180 machines.

Q. That is on the basis that I asked you to consider. A. Yes, sir.

Q. And the net profit on those machines for the year was $125,107.69? A. Yes.

(Testimony of John N. Newland.)

Q. And he purchased $39,924.22 in new equipment, new machines? A. Yes.

Q. Now will you give that information on other years?

A. 1943, gross income $173,144.48; there were 372 machines on the same basis, the net income as shown, $106,396.62 and he paid $5,763.23 for new equipment.

Q. And for the year 1944?

A. Gross $140,405.95—496 machines, $15,582.27 net income and purchased in machines $16,932.95.

Q. Now the next year?

A. Now, for the year 1945 this gross income was $191,446.83; he had 480 machines, the net profit was $48,644.44 and he purchased $3,510.90 in new machines. The next year [391] the gross income was $246,469.77, he had 556 machines, the net profit was $82,873.12, the purchase of equipment amounted to $35,049.20.

Mr. Patten: I think that is all.

Redirect Examination

Q. (By Mr. Emigh): Those figures that you have given are based on the assumption that Mr. Patten gave as to the number of machines?

A. Yes, that is an assumption but the rest is right.

Q. You are not basing the number of machines from the books?

A. No, because the ledger does not show that, I have not seen any record of the number of ma-

(Testimony of John N. Newland.)

chines, it may be that there is such a record but I do not know of it.

Q. If the assumption of the number of machines and the amounts in relation to the gross income is not correct, then the conclusion is not correct?

A. No, the accuracy of the statement would depend on the conclusion or the other way.

Q. It is based upon facts set forth in the question of the attorney and not on the facts appearing in these records?

A. That is right.

Mr. Emigh: That is all.

Recross-Examination [392]

Q. (By Mr. Patten): If my assumptions are correct then the results are correct?

A. Yes, I would say they would be.

Mr. Patten: That is all.

Mr. Emigh: That is all.

RUTH POSKA

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Purdy): You may state your name?

A. Ruth Poska.

Q. Where do you reside?

A. Lincoln, Nebraska.

Q. Where did you reside in the year 1944?

(Testimony of Ruth Poska.)

A. Wallace, Idaho.

Q. Are you acquainted with the defendant, A. F. McFee? A. Yes, sir.

Q. Were you employed by Mr. McFee in that year? A. Yes, sir.

Q. How long did you continue to be employed by Mr. McFee? A. Six years.

Q. What were your duties?

A. To begin with I did general office work and then I became [393] his bookkeeper in 1945.

Q. You were in charge of the books and records of the North Idaho Sales Company?

A. Yes, sir.

Q. Did you have access to the safe?

A. Yes, sir.

Q. I will ask you if, during the year 1945, there was a considerable sum of money in the safe that was Mr. McFee's personal money?

A. Yes, there was.

Q. I will ask you whether or not that money that was in the safe was in any way connected with the operation of the business of the North Idaho Sales Company? A. No.

Q. Mrs. Poska did you at any time pay money to the Dan Mac Lease? A. Yes, sir.

Q. Which lease did you pay on?

A. The Dan Mac Lease.

Q. Did you take money for the payment you made on the Dan Mac Lease from the funds of the North Idaho Sales Company or the funds of Mr. McFee?

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(Testimony of Ruth Poska.)

A. Those were from Mr. McFee's private funds.

Q. Under Mr. McFee's direction was it?

A. Yes, sir.

Q. Was that money in the safe at the time you came to the [394] employment of Mr. McFee?

A. Yes, it was.

Q. Do you know the amount of money in that safe that was his, that was Mr. McFee's.

A. No, sir.

Q. After you made all of the payments, after you paid all of the payrolls to the Dan Mac Lease and any matters in connection with that was there money still left in that safe, in Mr. McFee's money?

A. Yes, sir.

Q. Did you advise the Government of those facts as you have stated? A. Yes, sir.

Q. Did you give them a statement such as you have testified to here in substance?

A. Yes, sir.

Q. Do you recall how much money you paid on the Dan Mac Lease? A. Not definitely.

Q. Approximately?

A. It must have been close to $50,000.00, I don't know for sure.

Q. It must have been close to that?

A. It must have been approximately $50,000.00.

Mr. Purdy: You may inquire.

Cross-Examination [395]

Q. (By Mr. Patten): Mrs. Poska who was working at the North Idaho Sales Company when you

(Testimony of Ruth Poska.)

started there? A. The bookkeeper you mean?

Q. Yes.

A. Helen Kenear.

Q. When did she leave?

A. October 15, 1945.

Q. Was that the first time you had access to the safe? A. Yes, sir.

Q. When was the first time that you saw those funds?

A. Well, I cannot say for certain, I used money for the Dan Mac Lease before Miss Kenear left but I didn't get it out of the safe, she got it out for me.

Q. So, at some time in November of 1945 was the first time that you saw this money?

A. Yes, or maybe in October.

Q. To the best of your knowledge will you tell the jury about how much money there was in the envelope and how was it there, in what denominations?

A. Yes, I recall it was a manila envelope, I don't know how much there was in it but a great deal of money, I didn't count it.

Q. Did any one else have access to that safe besides you? A. Only McFee.

Q. At the end of 1946 was there some money still left there? A. Yes, sir. [396]

Q. A good bit of money left there at that time?

A. I would say quite a lot of money.

Q. In picking up the envelope, was it light or heavy, I am not trying to confuse you, I only want the facts.

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(Testimony of Ruth Poska.)

A. I actually can't remember but it seems that there was a great deal of money.

Q. Do you know of your personal knowledge that Mr. McFee did not put the money in that safe in 1945 or 1944?

A. Not to my knowledge.

Q. He could have put the money in there?

A. Yes, he could have.

Q. When you say this money wasn't related to the business of the North Idaho Sales Company, do you know where this money came from?

A. No, I didn't know.

Q. Isn't it a fact that you just know that it didn't get on the books, didn't get deposited in the bank, or wasn't reported in the books?

A. That is right.

Q. You didn't know where it came from?

A. No, I didn't.

Q. It could have come out of the slot machines couldn't it?

Mr. Purdy: We object to this, she said that she didn't know.

Mr. Patten: I will withdraw that question.

Q. You say that you didn't and don't know where it came from? [397]

A. That is right.

Q. Are you very familiar with this record (indicating)? A. Yes.

Q. You have used a lot of those? A. Yes.

Q. Didn't you receive them from the operations——

(Testimony of Ruth Poska.)

Mr. Purdy: I object to that as not proper cross-examination, it is not related to the direct examination in any way this matter not having been gone into on direct examination and it has been covered by numerous other witnesses, this witness did not testify to the matter at all.

The Court: She may answer.

Q. Let me ask this, you received the records from all of Mr. McFee's operations? A. Yes.

Q. And what did you do with them after you received them?

Mr. Emigh: May that objection go to this examination on the ground that it is not proper cross-examination, that it is irrelevant, immaterial and incompetent and does not relate to matters testified to by this witness on direct examination.

The Court: I am not sure that I understand the purpose of this examination.

Mr. Patten: I am proving, or attempting to prove that she had no basis of knowing——

Mr. Emigh: ——Now we challenge that statement, the record shows that this money was in the office. [398]

The Court: As I understand it she has testified that she didn't see this money until October of 1945, she never knew about the money prior to that time. I will permit the cross-examination.

Q. What did you do with this record that you got from these operations?

A. I checked those with the bank deposit slips and each had to be reconciled with the books.

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(Testimony of Ruth Poska.)

Q. What did you do with the books then?

A. When I completely checked those books I turned them to Mr. McFee.

Q. Have you seen them since that time?

A. No, sir.

Q. Did the Government Agents ask for those books? A. I believe so, yes sir.

Mr. Patten: That is all.

Mr. Purdy: No further questions.

CHARLES GROSSCIRTH

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): Where do you reside Mr. Grosscirth? [399]

A. St. Ignatius, Montana.

Q. Your occupation or business?

A. I am a business man and rancher.

Q. What does your ranch consist of?

A. Livestock.

Q. How many acres of land?

A. 6,000 acres.

Q. And how much livestock on that ranch?

A. 450 head.

Q. Do you have any mills or other operations?

A. Yes, at Ronan——

Q. ——Do you have any other business enterprises? A. Yes.

Q. Where are those located?

(Testimony of Charles Grosscirth.)

A. Kansas and Illinois.

Q. What are they? A. Grain elevators.

Q. Any other business?

A. I am interested in a distillery in Anchorage, Kentucky.

Q. Are you acquainted with Mr. A. F. McFee, the defendant in this proceeding? A. Yes, sir.

Q. When did you first meet him?

A. In Havana in 1929.

Q. Were you in business in Havana in 1929?

A. Yes. [400]

Q. In what business were you engaged?

A. Distilling.

Q. Did you have any business transactions with Mr. McFee? A. Yes, sir.

Q. Was that just a small business transaction or was it a large quantity transaction?

A. Well there was more than one, I would say that they were considered large quantity.

Q. What part of the year 1929 did you meet Mr. McFee? A. In the summer of 1929.

Q. Was Mr. McFee residing in that part of the country?

A. He was residing in New Orleans.

Q. How did the business transactions continue with Mr. McFee?

A. Until the spring of 1932.

Q. Can you give an estimate of the amount of business, approximately, in dollars and cents that was transacted between yourself and McFee?

A. From 1929 until I stopped doing business

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(Testimony of Charles Grosscirth.)

with him I would say $100,000, more or less.

Q. Do you recall an occasion when Mr. McFee purchased 2,000 cases of whiskey at one order?

A. I would say that he purchased as much as 8,000 or 9,000 cases but I don't recall any one specific order for 2,000 cases.

Q. Those were cash purchases?

A. Cash and some credit; I extended some credit but it was [401] short term credit.

Q. Mr. McFee owes you nothing at the present time in regard to those transactions?

A. No, sir.

Mr. Emigh: You may cross-examine.

Cross-Examination

Q. (By Mr. Patten): When did the business transactions cease with Mr. McFee?

A. In 1932.

Q. Why did they cease?

A. I think Mr. McFee was convicted and sent to prison.

Q. Was this an illegal transaction?

A. No, Mr. McFee bought the liquor in Cuba and we shipped it to Guatamala and it was perfectly legal.

Q. From your side? A. Yes, sir.

Q. You have no idea what Mr. McFee did with the liquor later? A. No.

Q. Do you know whether these funds with which he purchased the liquor were personal funds of Mr. McFee's?

(Testimony of Charles Grosscirth.)

A. I do not, but I know that he paid for it, I assume they were.

Q. Wasn't it a fact that these funds might have belonged to some one else? [402]

A. I wouldn't know.

Q. How were they handled in cash or in currency?

A. Some in cash and some in cashier's checks.

Q. You are talking about the $100,000.00 gross business over a period of time? A. Yes.

Q. How much did he buy in a single trip?

A. I believe remember one of about 1500 cases.

Q. How much would that involve?

A. It would involve at that price, about $37,500.00.

Q. Isn't it a fact that from 1929 to 1932 Mr. McFee acted as a salesman for the W. D. K. Distillers of Vancouver, British Columbia?

A. I don't know.

Q. Isn't it a fact that he was employed by this company at some three hundred a month?

A. I don't know.

Q. And this money could have belonged to the W. D. K. Distillery Company of Vancouver?

A. I wouldn't know.

Q. But he could have been a salesman for this distillery company? A. I wouldn't know.

Mr. Patten: That is all.

Redirect Examination [403]

Q. (By Mr. Emigh): Your transaction with

(Testimony of Charles Grosscirth.)

him was as an individual? A. That is correct.

Mr. Emigh: That is all.

Mr. Patten: That is all.

The Court: We will take a recess for 15 minutes at this time.

April 30, 1952, 11:20 o'clock a.m.

Mr. Patten: I would like to have Mr. Newland recalled for one question.

The Court: You may do that, Mr. Newland will you take the stand?

JOHN M. NEWLAND

A witness for the defendant, having heretofore been duly sworn, recalled for cross-examination.

Cross-Examination

Q. (By Mr. Patten): Mr. Newland, I would like to correct the first assumption you took in the year 1942 assume the tax is $50.00 and correct that figure?

A. Then that would be 360. [404]

Mr. Patten: That is all.

CHARLES GROSSCIRTH

A witness having heretofore been called by the defendant, and having been duly sworn, recalled.

Redirect Examination

Q. (By Mr. Purdy): Referring to the year

(Testimony of Charles Grosscirth.)

1935, did you have any business transactions with Mr. McFee? A. Yes.

Q. Do you recall the amount of business you had with him, that is, in money?

A. Approximately around $5,000.00.

Q. Going back to the year 1929 to 1931 I will ask you if you were acquainted with Mr. Smith, Moore Smith?

A. I knew him at a later date.

Q. Do you know whether Mr. McFee sold to Mr. Moore Smith 2,000 cases of whiskey?

A. No, I don't.

Q. Do you know whether Mr. McFee sold him any whiskey? A. No, I don't.

Mr. Purdy: That is all.

Mr. Patten: No questions.

RICHARD FIELDS [405]

Being recalled as a witness for the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Emigh): In connection with the operation of slot machines does the owner of the machines or did the owner in 1943 or the location buy the license or was it the operator?

A. The operator bought the license.

Q. And in whose name was the license?

A. In the name of the location, owner.

Q. Each time the ownership of the location changed would it be required that a new license

(Testimony of Richard Fields.)

be obtained? A. Yes, absolutely.

Q. And would you say that these location ownerships or the owner of the location changed frequently?

A. Yes, in some cases quite frequently.

Mr. Emigh: You may inquire.

Cross-Examination

Mr. Patten: No questions.

Mr. Emigh: May the record show that the defense rests.

The Court: At this time we will recess until 2:00 o'clock. [406]

April 30, 1952, 2:00 o'clock p.m.

H. R. McINTYRE

Recalled in rebuttal as a witness by the plaintiff, having heretofore been duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Patten): I believe that at the time you previously testified you told the jury that you had been a Revenue Agent for 30 years and here since 1924? A. Since 1926.

Q. You have been handed Exhibit marked 53 and also Plaintiff's Exhibits 1 and 2 and 5, would you explain to the jury what effect Plaintiff's Exhibit 53 has on the documents shown to you as 1, 2 and 5?

Mr. Emigh: We object to that as not proper re-

(Testimony of H. R. McIntyre.)

buttal, it does not tend to rebut anything offered by the defendant. The exhibit speaks for itself.

The Court: He may answer.

A. This reflects an overpayment.

Q. Will you identify the document?

A. It is a communication from P. H. Sherwood, Head of the Division, this reflects an over payment in the 1944 [407] income estimate of $25,879.94.

Q. For what year? A. 1944.

Q. When was the estimate filed on which these payments were made?

A. Will you state that question?

Q. Yes, when were the estimates filed?

A. You mean the date of payment?

Q. The date the estimate was filed?

A. It does not show.

Q. When were the payments made?

A. On May 17, 1944, $18,464.00; June 20, 1944, $13,686.00; September 15, 1944, $3,071.28.

Q. Does the Sherwood indicate that the Collector sent Mr. McFee a check for any amount of money?

Mr. Emigh: We object that, the letter speaks for itself.

The Court: He may answer.

A. It reflects an over payment but does not necessarily indicate that he received a check.

Q. Will you refer to Exhibits 1 to 9 and by reference to 1 to 9, how much did Mr. McFee pay to the Collector's office in 1945?

Mr. Emigh: Objected to as not proper rebuttal, the matter was gone into in the case in chief.

(Testimony of H. R. McIntyre.)

The Court: The question seems to be how this large [408] check was handled, whether it was in cash or whether he was given credit for it.

Q. Will you tell us what happened on the books of the Collector's office?

Mr. Emigh: Objected as it doesn't show the nature of the payment.

The Court: It must be connected with this check.

A. Yes, he received credit for that overpayment on subsequent years income returns.

Q. How much tax did he owe for 1945 as shown by the tax return?

The Court: The question is whether it was given to him in cash or credit if this witness can testify to that he may answer.

A. He received credit for that over payment on his 1945 income tax return up to the amount of $10,021.05.

Q. How much credit on the 1946 tax?

A. $15,858.89.

Q. Did the collector ever make payment of the $25,879.94 to Mr. McFee? A. No, sir.

Q. How was this credit used up?

A. By applying it to subsequent years income tax liability.

Mr. Patten: You may examine.

Cross-Examination [409]

Q. (By Mr. Purdy): He over-estimated and got credit for it in following years? A. Yes, sir.

Mr. Purdy: That is all.

Mr. Patten: That is all.

CHARLES J. SEYMOUR

Called as a witness for the plaintiff, in rebuttal after being first duly sworn, testifies as follows.

Direct Examination

Q. (By Mr. Patten): What is your address, Mr. Seymour?

A. 401 Park Drive, Coeur d' Alene.

Q. How long have you lived in Coeur d' Alene?

A. Since 1906.

Q. Your business?

A. My occupation is Secretary of the Fraternal Order of Eagles.

Q. How long have you held that office?

A. Since 1927.

Q. Does the Eagles Lodge have slot machines?

A. Yes, sir.

Q. And did they have slot machines in 1945 and 1946? A. Yes, they did.

Q. Do you keep a record of the receipts from those slot machines?

Mr. Emigh: Objected to as incompetent, irrelevant and [410] immaterial and no proper foundation to go into this evidence, there is no connection between this and the defendant McFee. It is immaterial whether they kept a record of the receipts or not, this is incompetent and before evidence of this kind is admitted there must be a foundation.

The Court: You have not permitted him to lay a foundation as yet. I am satisfied there is no foundation laid.

Q. Did you have slot machines in your club in

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(Testimony of Charles J. Seymour.)

1945 and 1946?

A. We did.

Q. Where is your club located?

A. 209 Sherman Avenue, Coeur d' Alene.

Q. Are these slot machines set tight or loose?

Mr. Emigh: We object to that, it is a very relative term and does not establish that they were of the same character as used in the places referred to in the testimony given in this case. It is immaterial how they set their slot machines and this does not lay a foundation as to any evidence that should go in here, there is not foundation laid for comparative testimony as to the places in which Mr. McFee had slot machines. This being a fraternal there is no similarity so that the jury may use this as comparative evidence.

The Court: There was some testimony about tight or loose machines I think the witness here, I have forgotten the name, testified as to the tight or loose machines at some of these locations. He may answer with the understanding that [411] it will be stricken if it is not connected up.

Mr. Patten: May I discuss this testimony with the Court?

The Court: Yes, you may.

Mr. Emigh: We object to this and suggest that the jury be excused.

The Court: I will hear you.

Mr. Patten: I understood that counsel for the defense stated that the receipts were correctly reflected in the books here. I am attempting to establish the number of machines he had and I am estab-

(Testimony of Charles J. Seymour.)

lishing what the slot machines took in in 1945 and 1946 and I am going to show by this witness what slot machines took in within two or three blocks of the place operated by the defendant.

Mr. Emigh: None of the slot machines testified to here according to the evidence were in any place similar to the place testified to by this witness. The machines in question here in this case, the testimony shows, are scattered all over the county in fact outside of this county and there are no receipts identified from machines in Coeur d' Alene. The testimony is such that no comparative testimony can establish anything.

Mr. Patten: My understanding is that the Foresters Club was a fraternal organization.

The Court: I believe he may answer.

Q. You did keep track of the receipts in 1945 and '46? [412] A. Yes.

Q. Do you have that record? A. Yes.

Mr. Emigh: May this evidence of this witness in relation to the receipts of the slot machines or from the slot machines in the Eagles hall go in under my objection which the Court has overruled as the foundation has not been laid and it is not fair comparative testimony and on the ground that there is no evidence that Mr. McFee had any interest in these machines; no evidence that McFee had any machines in any fraternal organization; there is no evidence that the patronage or the number of patrons was the same or can be compared.

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(Testimony of Charles J. Seymour.)

The Court: Do you expect to connect this up with McFee?

Mr. Patten: No, except that they were like slot machines.

The Court: I will sustain the objection.

Mr. Patten: That is all of this witness. We have a subpoena for a witness from Wallace, he is a banker and I understand that he is on his way.

The Court: We will recess at this time until 3:30 o'clock.

April 30, 1952, 3:30 o'clock p.m. [413]

Mr. Patten: I determined that the witness whom we had subpoenaed has just left Wallace and in the interest of time we have entered into a stipulation that we may admit this exhibit as being the account of A. F. McFee, it may be admitted as Exhibit Number 58.

Mr. Emigh: We so stipulate.

The Court: It may be admitted and so stipulated.

Mr. Patten: The Government rests.

Mr. Emigh: The defense rests. I have submitted a motion to the Court, it is similar to the motion submitted at the close of the plaintiff's evidence.

The Court: Do you have anything to add?

Mr. Emigh: Yes; the present state of the record includes evidence which tends to weaken the evidence of the Government by way of explanation for some considerable amount of funds and I will submit it on the argument made before.

The Court: The motion will be denied.

The Court: If it is the desire and a record is made the motions filed with the Clerk may be transcribed and made a part of the record. The record may also show that counsel are requested to come to Chambers and go over the proposed instructions with the Court, and at this time I will adjourn until tomorrow morning. [414]

May 1, 1952, 10:00 o'clock a.m.

The Court: I will limit the argument to one hour and fifteen minutes on a side. I will set the lunch hour for 1:00 o'clock and we will submit this case to the jury before lunch.

(Argument of counsel.)

(Instructions of the Court.)

The Court: Ladies and Gentlemen of the jury, this is a very important case, our income tax law and the duty of every citizen to obey it is very essential to the welfare of our nation. I doubt if a more important case than the one you are called upon to decide has ever been presented to a jury during my time as Judge of this Court.

I feel that you will be very careful to see that there is no miscarriage of justice in the verdict that you will soon be called upon to return to this Court.

Before you were called here to serve as trial jurors in this case a Grand Jury had returned an indictment against the defendant charging him with the commission of a crime; the offense generally known as "income tax evasion".

The offense or charge is set forth in the indict-

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ment in two counts, which have been explained to you in the statements of counsel. The indictment was read to you at the beginning of the trial by the Clerk, and as stated by the Clerk, the [415] defendant has heretofore entered his plea of not guilty, which means that he denies the charge or charges in the indictment.

Now, I want to caution you at the outset that the indictment is in itself no proof of guilt. It is a mere formal accusation made by the Government against the defendant charging him with the commission of an offense. The Government thus advises him in advance of his trial of the issues he must meet in order that he might prepare his defense. You will understand that he is not to be prejudiced, nor are you to be influenced by the fact that he had been indicted and you will not consider the indictment as evidence in any manner.

You are instructed that the gist of the offense charged in this indictment is a wilful attempt on the part of the defendant Austin F. McFee to evade or defeat the tax for the years 1945 and 1946 imposed by the income tax laws. The statute, in its pertinent portions, provides: "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall in addition to other penalties provided by law be guilty of a felony."

The word "attempt" as used in this law, involves two elements: (1) an intent to evade or defeat the tax and (2) some act done in the furtherance of such intent.

The indictment in this case charges that the

means by which the defendant attempted to evade the income taxes imposed by law was by filing with the Collector of Internal Revenue returns which understated his income for 1945 and 1946. [416]

The word "attempts" contemplates that the defendant had knowledge and understanding that during the calendar years 1945 and 1946 he had income in addition to that which he reported on his tax returns and he attempted to evade or defeat the taxes due on this additional income by purposefully failing to report all the income he knew he received during the years 1945 and 1946.

After you were sworn you were advised by the Government through its counsel in some detail what the Government expected to prove and what the nature of the proof would be. This statement, like the indictment is not to be considered as evidence. It was made merely for the purpose of enabling you to better understand the testimony which followed. During your deliberations in this case and when you arrive at a verdict it should be upon the evidence submitted to you during the trial and upon that alone, and not on any statement of counsel.

You are the judges of the credibility of the witnesses and of the weight to be given to their testimony. That is your right and responsibility; not even the Court can deprive you of that right, or relieve you of the responsibility of the determining the facts and passing on the weight and credibility of the testimony.

In determining the weight to be given the testimony of any witness you may take into considera-

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tion his or her interest in the case; his or her candor or frankness or lack of it, and [417] also his or her qualification to know and understand the matter about which he or she may testify.

As I mentioned, it is your duty to pass upon the facts in this case; likewise, it is the duty of the Court to pass upon the law and to instruct you as to the principles of law applicable to the matter being tried. You are bound by your oaths to accept the instructions of the Court as the law in the case.

If the Court has inferred, or if you should have gathered during the trial of the case that the Court has some opinion as to the facts in this case you will disregard that entirely. The matter of the guilt or innocence of the defendant as based on the facts presented to you here is a matter for your determination and yours alone and the Court has not intended to infer at any time that he had any feeling on the matter.

When you go to your jury room, and indeed during your entire deliberations, you will bear in mind and be governed by the general rule that the defendant in this case is presumed to be innocent of the offense charged until his guilt is proved by competent evidence beyond a reasonable doubt.

The burden is therefore upon the Government to prove the defendant guilty beyond a reasonable doubt, that means that the Government has the burden of proving the material allegations of the indictment beyond a reasonable doubt. I don't want you to be misled by all the questions you were asked

when you were qualified as to reasonable doubt, nor by argument of Counsel.

You will note that the phrase is "reasonable doubt". It [418] is just such a doubt as the term implies and is a doubt for which you can give a reason. It means a doubt which is reasonable in view of all the evidence. A doubt growing out of the testimony in the case, or the lack of testimony.

I may say generally; if after you have fairly considered all the evidence, with a sincere desire and reasonable effort to reach a conclusion, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt, and of course, you should acquit the defendant. But upon the other hand, if, after an impartial and earnest consideration of all the evidence, your minds are in such a condition that you can truthfully say that you have an abiding conviction that the charge is true, then you have no reasonable doubt and it would be your duty to convict.

Under this indictment there must be an intent on the part of the defendant to evade the payment of proper income tax. The question of intent is a matter for you, as jurors to determine, and as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have for arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits admitted in evidence, and from all such facts and circumstances you

should determine what the intent of the defendant was at the time in question here.

You are instructed that if you find substantial evidence [419] outside of the defendant's own statements consisting of increase of net worth during the taxable years or any absence of personal records or books of account or the failure of books and records to show fully its transactions or those of the defendant then this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through whatever means he might do so.

I don't want to comment on the evidence but there is one outstanding matter that you are left in the dark about, I don't intend to make any inference about it, as the evidence here is solely for you. But where are the tickets that should show the receipts and division of the money taken from the slot machines for the years 1945 and 1946. There was only one of these books of tickets introduced in evidence by the defense. None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with the bank account that it would have been an easy matter for the defense to produce the tickets if they have not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?

The burden of proof resting upon the Government does not shift during the case but when in

the trial of charges of income tax evasion discrepancies between the taxpayer's returns and his actual income are indicated by the Government's [420] proof, the failure of the defendant to offer explanation in any form may be considered by you in finding your verdict.

You are instructed that the defendant is charged with attempted evasion of his income tax for only the years 1945 and 1946. Any evidence of like or similar transactions by the defendant for other years which you may have heard is to be considered by you only insofar as you may find it bears upon or relates to the intention of the defendant with respect to tax evasion for the years of 1945 and 1946.

You are instructed that you may find from the fact that the defendant signed his individual tax returns he had knowledge of the contents of those returns.

You are instructed that if you find that there were any gains profits, or income received by the defendant which were not reported, it makes no difference as far as the question of taxability is concerned whether such income was lawfully received or unlawfully received, inasmuch as both would be taxable and should have been reported.

You are instructed that it is not necessary that the Government prove an evasion of all the tax charged in the indictment. It is sufficient if there was an attempt to evade any substantial portion of the taxes as charged in each of the two counts of the indictment.

You are instructed that the possession of money alone is not sufficient to establish net taxable income. However, evidence of the possession and the expenditure of money during [421] the years 1945 and 1946 may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income during such years.

The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly or intentionally did not report all his taxable income for the years 1945 and 1946 and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.

Bonafide mistakes should not be treated as false returns or as a willful attempt to evade the payment of income tax; however, the duty to file the return is personal and it cannot be delegated, and no man who is able to read and write and has the mentality to understand business transactions and who signs a tax return should be allowed to escape the responsibility of good faith and ordinary diligence as to the correctness of the return which he signs, whether prepared by himself or somebody else.

You are instructed that, if you find that the defendant spent the large sums of money the Government claims he spent during the years 1945 and 1946, on the question of when he received this income you may consider whether his business as many others was the beneficiary of the prosperity

of the war and post war years. You may also consider the pattern of his expenditures. That is to say, you may consider whether his [422] expenditures appeared to be expenditures which kept pace with his earnings or whether they appeared to be expenditures which bore no relation to earnings.

You are instructed that the owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business. Of course, he would not be liable for innocent clerical mistakes; but he must be held to know that which it is duty to know, and it is for you to determine from all the evidence whether the defendant had knowledge of the falsity of the returns as charged in the indictment, if you find such returns were false.

The Government has attempted to establish the defendant's income for the years 1945 and 1946 by showing that he accumulated more and spent more in these years than he reported on his tax returns. This is in the nature of circumstantial evidence. Therefore, you should consider whether or not the Government has precluded every reasonable source of these funds except earnings for the years charged. However, the Government is not required to refute all possible speculation as to the source of these funds.

You are instructed the revenue laws provide that if the method of accounting employed by a taxpayer does not clearly reflect his income a computation may be made upon such basis and in such manner as, in the opinion of the Commissioner, does

fairly reflect such income. In this case the Revenue Agent was authorized and did undertake to ascertain the defendant's [423] income by two computations. The first is termed an unexplained expenditure computation. The second is termed an increase in net worth computation. Both are based upon the proposition that if a man accumulates more or spends more in a given year than his reported income, and if it is established that he did not get these funds by loan, inheritance, gift, savings or the sale of some property which he owned it would seem he must have received income. However, it is for you to determine whether the defendant's expenditures exceeded his reported sources of income and it is for you to determine whether or not he could have obtained the funds so expended from any source other than earnings.

Evidence is of two kinds, positive and circumstantial. Positive or direct evidence is said to be when the witness testifies directly out of his own personal knowledge to the matters in issue. Evidence is circumstantial when a witness testifies to matters having only an indirect or circumstantial bearing upon such issue.

Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.

You are instructed that throughout this proceeding the counsel for defendant has asserted that he may have accumulated money in previous years with which to make such investments and impliedly,

out of unexplained income. In a [424] prosecution for attempting to evade income taxes by filing false and fraudulent returns where government relies upon net worth method to establish defendant's income, the Government is not required to refute all possible speculation as to the source of defendant's asserted funds.

You are instructed that an attempt to evade income tax for each year is a separate offense. The indictment in this case, therefore, charges separate offenses. Count one charges an attempt to evade tax for the calendar year 1945. Count two charges an attempt to evade tax for the calendar year 1946.

The defendant, as you have observed, has not testified. This is his constitutional right. You will not infer guilt from this fact. You will not indulge in any presumption against him by reason of his failure to testify. A defendant in a criminal case, may, at his option, either take the witness stand and testify, or may remain silent. He may remain silent because the principle that the burden is upon the Government of showing his guilt and not upon him for proving his innocence. You are not to go to your jury room and imagine, surmise or conjecture what he might have testified to. You are to take the testimony as it has been presented here and reach a conclusion upon that and not upon any conjecture or surmise as to what any witness might have testified to if he had been sworn and called to the stand.

You will not consider any evidence which may have been ordered stricken from the record during

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the trial, nor will [425] you consider any evidence that may have been offered and rejected by the Court.

Your verdict should be based only on evidence submitted to you from the witness stand.

Counsel may have during their argument stated to you what they considered the evidence to be as to some fact or facts. I instruct you now, that if any statement concerning what the evidence was, is different than your recollection of the evidence, you will not take the statement of counsel but your own recollection. As I told you heretofore, you are the judges of the fact and it is for you to say what the evidence was, as submitted from the stand.

In this Court it is necessary that your verdict be unanimous. You will, when you retire, elect one of your number as foreman and when you agree upon a verdict your foreman alone need sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble in using the form which correctly reflects your finding. You will find in the various forms, the words "guilty" and "not guilty" as to count one and count two. You will have your foreman sign the form indicating your finding on each count.

It is necessary that I consult with counsel on a matter of law and I will ask you to step into the jury room for a moment. You will be called back for your final instructions.

(In the absence of the jury.)

The Court: Does the Government wish to register [426] any exceptions to the Court's instructions?

Mr. Patten: None, your Honor.

The Court: Does the defendant wish to register any exceptions to the instructions as given?

Mr. Purdy: Regarding the instruction in which the Court made some comment as to the collection books.

The Court: You will have to specify what your exceptions are.

Mr. Purdy: We except to that portion of the Court's instruction in relation to the failure of the defendant to retain the sales slips, or collection slips.

The Court: You may have your exception.

(In the presence of the jury.)

The Court: Ladies and Gentlemen of the Jury; when I instructed you I made some comment concerning the failure of the defendant to produce these sales slips or tickets, check on the slot machines, or receipts from the slot machines. You understand that you are not to draw any inference from the Court's remarks, these are questions of fact for the jury, and you are not to be influenced by any remarks by the Court as to what the Court thinks about the testimony.

Now, Ladies and Gentlemen of the Jury, I will excuse you once more. You will be recalled.

(Jury excused.)

Mr. Emigh: We would like an exception to the failure of the Court to give the requested instruction that not only must the evidence prove guilt but that it must [427] prove the hypothesis of guilt to the exclusion of all other hypotheses.

The Court: You may have your exception.

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(The alternate jurors were excused and the jury retired to deliberate on the verdict.)

May 1, 1952, 8:30 o'clock p.m.

(Jury returned for additional advice and instruction.)

The Court: You have been deliberating for some eight hours, have you been able to agree upon a verdict?

Foreman: Not yet.

The Court: Is there any assistance the Court can give you? I don't want to know what the Jurors think but is there any questions you have?

Foreman: Yes, the question of circumstantial evidence, we would like that instruction.

The Court: Would you like me to give that again?

Foreman: Yes.

The Court: I will read the instruction. Would you like all the instructions again?

Foreman: Just as to circumstantial evidence.

The Court: Evidence is of two kinds, positive and circumstantial. Positive or direct evidence is said to be when the witness testifies directly out of his own personal [428] knowledge to the matters in issue. Evidence is circumstantial when a witness testifies to matters having only an indirect or circumstantial bearing upon such issue.

Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.

Either positive or circumstantial evidence will uphold a conviction.

Is there any other part of the instructions you would like?

Foreman: That is all.

The Court: I don't want to work a hardship on this case but I will ask you to consider it further. Of course, if you cannot agree and are satisfied of that, all you have to do is come in and tell the Court that you cannot agree and then I will determine what to do, you may retire to deliberate.

[Endorsed]: Filed July 25, 1952. [429]

[Endorsed]: No. 13482. United States Court of Appeals for the Ninth Circuit. Austin F. McFee, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed: August 11, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 13482

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

AUSTIN F. McFEE, Defendant-Appellant.

MOTION FOR PERMISSION NOT TO PRINT EXHIBITS

Comes now the Appellant in the above entitled cause, through his Attorneys, and respectfully requests the above entitled court to grant its permission to permit all of the Exhibits herein to be not included in the printed record, but that said Exhibits may be considered, and be referred to, by the Court and Counsel as though contained in the printed record on Appeal. This Motion is made and based upon the Stipulation of the parties attached hereto.

Dated July 23rd, 1952.

/s/ J. F. EMIGH,
/s/ HAROLD S. PURDY.

ORDER

Pursuant to the above and foregoing Motion of Appellant and the stipulation of the parties,

It is hereby ordered that none of the Exhibits in the above entitled cause need be printed in the record, and that said Exhibits may be considered, and

be referred to, by the Court and Counsel as though contained in the printed record on Appeal.

Dated this 15th day of August, 1952.

/s/ WILLIAM DENMAN,
Chief Judge, U. S. Court of Appeals for the Ninth Circuit.

/s/ HOMER T. BONE,
/s/ WM. E. ORR,
Judges, U. S. Court of Appeals for the Ninth Circuit.

STIPULATION NOT TO PRINT EXHIBITS

It is stipulated and agreed by and between the parties hereto through their attorneys of record that none of the Exhibits in this cause need be printed in the record but that all of said Exhibits may be considered, and referred to, by the Court and Counsel as though contained in the printed record on Appeal.

Dated: July 9, 1952.

/s/ J. F. EMIGH,
/s/ HAROLD S. PURDY,
Attorneys for Appellant.
/s/ JOHN A. CONNER,
United States Attorney,
/s/ HERMAN J. ROSSI,
Assitant United States Attorney
Attorneys for Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 19, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now the appellant and, pursuant to Rule 19 (6) of the Rules of the above entitled Court does hereby set forth the points on which he intends to rely on appeal, as follows:

1. That the Court erred in denying the motion of defendant, Austin F. McFee, for a continuance.

2. The evidence is insufficient to justify the verdict of guilty in that:

a. There was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant violated Section 145 (b), Internal Revenue Code; title 26, U.S.C.A., Section 145 (b), as charged in Count One of the indictment.

b. There was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant violated Section 145 (b), Internal Revenue Code; title 26, U.S.C.A., Section 145 (b), as charged in Count Two of the indictment.

c. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant had an income of $105,077.90 in the year 1945 or any other sum at all in excess of the sum of $25,166.57.

d. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant owed the United States of America an income tax for the year 1945 in the sum of $71,076.35 or any other sum

or amount in excess of $10,021.05.

e. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant had an income of $113,748.77 in the year of 1946 or any other sum at all in excess of the sum of $39,679.01.

f. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant owed the United States of America an income tax for the year 1946 in the sum of $74,881.45 or any other sum or amount in excess of $18,091.35.

g. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant did willfully and knowingly attempt to defeat and evade a large part or any other part of the income tax owing by him to the United States of America for the calendar year 1945.

h. That there was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant did willfully and knowingly attempt to defeat and evade a large part or any other part of the income tax owing by him to the United States of America for the calendar year 1946.

i. There was no evidence upon which a reasonable mind could find beyond a reasonable doubt, or at all, that the defendant had the corrupt, dishonest or evil intent or motive necessary to support a verdict of guilty.

3. That the Court erred in denying defendant's

motion for judgment of acquittal at the close of the plaintiff's case for the reasons set forth in paragraph two hereof and in defendant's motion for judgment of acquittal.

4. That the Court erred in denying defendant's renewal of motion for judgment of acquittal at the close of all evidence in the case for the reasons set forth in paragraph two hereof and in defendant's renewal of motion for judgment of acquittal.

5. The verdict is contrary to law, and the instructions of the Court.

6. That the Court erred in permitting witnesses for the appellee to testify as to extra-judicial statements of the defendant without proof of the corpus delicti of the offense charged independent of proof of such extra-judicial statements.

7. That the Court erred by failing to instruct the Jury to the effect that circumstantial evidence, to entitle the Jury to convict thereon, must tend to prove all material allegations of an offense charged beyond a reasonable doubt and must be consistent and compatible only with the hypothesis of guilt and inconsistent with any other reasonable hypothesis.

8. That the Court failed to instruct the Jury generally on the force and effect of circumstantial evidence after the Jury returned from the Jury Room and requested instruction as to the law of circumstantial evidence.

9. That the Court in instructing the Jury as to the law of circumstantial evidence upon the Jury returning for instructions on that subject failed to

repeat the instructions given to the Jury and did so instruct the Jury as to tend to indicate to the Jury that circumstantial evidence in the case would uphold a conviction without admonishing the Jury that such evidence, however, must be compatible with, or support, only one reasonable hypothesis, namely that of guilt.

10. That the Court erred in giving the following instruction: "You are instructed that if you find substantial evidence outside of the defendant's own statements consisting of increase of net worth during the taxable years or any absence of personal records or books of account or the failure of books and records to show fully its transactions or those of the defendant then this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through whatever means he might do so.

"I don't want to comment on the evidence, but there is one outstanding matter that you are left in the dark about, I don't intend to make any inference about it, as the evidence here is solely for you. But where are the tickets that should show the receipts and division of the money taken from the slot machines for the years 1945 and 1946. There was only one of these books of tickets introduced in evidence by the defense. None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with

the bank account that it would have been an easy matter for the defense to produce the tickets if they have not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?

"The burden of proof resting upon the Government does not shift during the case but when in the trial of charges of income tax evasion discrepancies between the taxpayer's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in finding your verdict."

In that by such instruction, duly excepted to, the Court indicated failure of the defendant to keep and produce daily collection books for the years 1945 and 1946, though the Internal Revenue agents had, for those years, and prior thereto, and subsequent thereto, access to all of Appellant McFee's records, and did not, so far as the evidence in this case discloses, at any time object or complain of the manner in which such collection books or records were kept or handled; that the evidence in the case clearly establishes that the contents of said collection books were correctly and truly entered in the permanent records of the Appellant McFee, to which the Internal Revenue agents had access, and that such collection books were nothing more in their nature than "sales slips", "tickets", or other temporary memoranda used for the purpose of preserving the matters thereon shown until en-

tered upon the permanent records of Appellant, and to verify collections with records of locations where amusement devices were operated; and there is no evidence in this case showing any discrepancy in any instance between the matters shown on collection books and matters shown on Appellant McFee's permanent records, and income tax returns.

That such instruction was misleading, confusing, argumentative, and prejudicial, to defendant, and tended to instruct the jury that there had been a failure on McFee's part to keep proper records and produce them at the time of the trial contrary to the evidence of the case.

That the Exhibit referred to by the Court in its instruction, Exhibit No. 39, was a blank book used for illustrative purposes only, and not a record or offered as a record.

That defendant was not required by law or regulations of the Commissioner of Internal Revenue to keep or preserve temporary records, but only such permanent records as he did keep and make available to the Collector of Internal Revenue.

That there is no evidence in the case justifying such an instruction.

11. The Court erred in denying appellant's offer of proof as to the records contained in defendant's exhibits Numbered 56 and 57 for the reason that said exhibits and the records therein contained, as indicated to the Court, were competent, relevant, material and sufficiently identified for the introduc-

tion thereof, and the denial of the offer of proof was prejudicial to the defendant.

Dated this 7th day of October, 1952.

/s/ HAROLD S. PURDY,
/s/ J. F. EMIGH,
Attorneys for Appellant.

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
State of Montana,
County of Silver Bow—ss.

Phyllis Knight, being first duly sworn, deposes and says that she is a citizen of the United States and the State of Montana, over the age of twenty-one years, and not a party to or in any manner interested in the above entitled case. That on the 7th day of October, 1952, she deposited in the United States Post Office at Butte, Montana, an envelope containing a true and correct copy of the hereunto attached Statement of Points Upon Which Appellant Intends to Rely on Appeal, addressed to John A. Carver, Esq., United States District Attorney, Boise, Idaho, with postage prepaid thereon.

That there is a regular United States mail between Butte, Montana, where defendant's attorney, J. F. Emigh, resides and has his office, and

Boise, Idaho, where John A. Carver, United States District Attorney resides and has his office.

/s/ PHYLLIS KNIGHT.

Subscribed and sworn to before me this 7th day of October, 1952.

[Seal] /s/ J. F. EMIGH,
Notary Public for State of Montana. Residing at Butte, Montana. My commission expires January 19, 1955.

[Endorsed]: Filed Oct. 9, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD DESIRED TO BE PRINTED

To: Paul P. O'Brien, Esquire, Clerk of the Above Entitled Court:

Appellant, Austin F. McFee, in the above entitled action, hereby designates the following portions of the record in said action, which he desires to be printed in the transcript of the record on appeal.

Indictment—Filed November 8, 1951.

Notice of Motion for Bill of Particulars—Filed April 2, 1952.

Notice of Amended and Supplemental Motion for Bill of Particulars—Filed April 2, 1952.

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Order for Bill of Particulars—Filed April 2, 1952.

Bill of Particulars—Filed April 3, 1952.

Motion for Continuance—Filed April 4, 1952.

Affidavit of Harold S. Purdy—Filed April 4, 1952.

Affidavit of J. F. Emigh—Filed April 4, 1952.

Order Over-ruling motion for Continuance—Filed April 4, 1952.

Amended Bill of Particulars—Filed April 22, 1952.

Motion for Judgment of Acquittal at Close of Plaintiff's case—Filed April 28, 1952.

Motion for Judgment of Acquittal at Close of all Testimony—Filed April 30, 1952.

Verdict of Jury—Filed May 1, 1952.

Judgment—Filed May 1, 1952.

Order staying Execution—Filed May 2, 1952.

Notice of Appeal—Filed May 12, 1952.

Bail Bond of Defendant in Sum of $10,000.00, pending determination of appeal.

Original Reporter's Transcript of Evidence of all Proceedings on trial of defendant, including return of jury requesting further instructions.

Order permitting withdrawal and transmittal of original exhibits.

Docket and journal entries, including date of filing this designation of record.

Order extending time to file transcript of record and docket cause in Appellate Court.

This designation of record on appeal and acknowledgment of service.

Certificate of the Clerk.

Order for Permission not to print exhibits.

Statement of points upon which Appellant intends to rely on appeal, with Proof of Service.

Dated at Butte, Montana, October 7, 1952.

/s/ HAROLD S. PURDY,
/s/ J. F. EMIGH,
Attorneys for Defendant and Appellant, Austin F. McFee.

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
State of Montana,
County of Silver Bow—ss.

Phyllis Knight, being first duly sworn, deposes and says that she is a citizen of the United States and the State of Montana, over the age of twenty-one years, and not a party to or in any mannner interested in the above entitled case. That on the 7th day of October, 1952, she deposited in the United States Post Office at Butte, Montana, an envelope containing a true and correct copy of the hereunto attached Designation of Portions of the Record Desired to Be Printed, addressed to John A. Carver, Esq., United States District Attorney, Boise, Idaho, with postage prepaid thereon.

That there is a regular United States mail between Butte, Montana, where defendant's attorney, J. F. Emigh, resides, and has his office, and Boise, Idaho,

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where John A. Carver, United States District Attorney resides and has his office.

/s/ PHYLLIS KNIGHT.

Subscribed and sworn to before me this 7th day of October, 1952.

[Seal] /s/ J. F. EMIGH,

Notary Public for State of Montana. Residing at Butte, Montana. My commission expires January 19, 1955.

[Endorsed]: Filed Oct. 9, 1952. Paul P. O'Brien, Clerk.

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No. 13482

United States
Court of Appeals
For the Ninth Circuit

AUSTIN F. McFEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Idaho, Northern Division.

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, July 30, 1953.

Before: Mathews, Healy and Orr,
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. I. F. Emigh and Mr. Harold S. Purdy, counsel for appellant, and by Mr. John Lockley, Attorney, Department of Justice, counsel for the appellee, and submitted to the Court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Monday, August 24, 1953.

Before: Mathews, Healy and Orr,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

United States Court of Appeals
for the Ninth Circuit

No. 13,482

AUSTIN F. McFEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Aug. 24, 1953

Appeal from the United States District Court for the District of Idaho, Northern Division

Before: Mathews, Healy and Orr, Circuit Judges.

Orr, Circuit Judge:

OPINION

Appellant was tried and convicted by a jury on two counts of an indictment for wilful attempts to defeat and evade income taxes due and owing by him for the years 1945 and 1946 in violation of § 145(b) of the Internal Revenue Code, 26 U.S.C.A. § 145(b). He was sentenced to imprisonment for one year and six months and a fine of $7,500 on each count, the terms of imprisonment to run concurrently; the imprisonment on count two to be suspended and appellant placed on probation for two years commencing after service of sentence on count one on the condition that appellant pay the amounts due the government on income tax.

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The judgment is challenged upon numerous grounds and we consider each contention in the order set forth in appellant's brief. The pertinent facts are set out in our consideration of each assignment of error.

I. Denial of Continuance

Appellant urges that the trial court erred in denying him a continuance. The indictment was returned November 8, 1951. Appellant was arrested November 17, 1951. He was arraigned April 1, 1952, and on that date the case was set for trial for April 22, 1952. On April 1, 1952, appellant asked for a bill of particulars. The bill of particulars was furnished April 2, 1952. Appellant asserts that it was not until then that he and his attorneys were advised that the Government had adopted the expenditure method of computing his income and tax. On April 4th he moved for a continuance and supported his motion with affidavits made by each of his two attorneys wherein they detailed certain investigations which they desired to make and to cause to be made in preparation for trial, which investigations, they averred, could not be accomplished within the time remaining before trial. "It is elementary that a matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law." Franklin v. State of South Carolina, 218 U.S. 161, 168.

This is by no means an extreme case. The affidavits filed by counsel in support of the motion present no facts from which a reasonable inference could have been drawn that substantial evidence supporting a defense would have been discovered. The showing, at most, was a request for time in which to make a search for new evidence. For some months prior to indictment appellant was represented by a firm of certified public accountants and by counsel. Surely, if a reasonable probability existed that a continuance would have enabled appellant to procure evidence not then known to him, a better showing would be expected in view of the expert assistance he had at hand and because of their presumed familiarity with his affairs. We see no prejudice resulting to appellant from the denial of a continuance. As a matter of fact the trial court exercised its discretion wisely by furthering an expeditious trial of the case. Such action is to be encouraged where, as here, the rights of a defendant are not jeopardized.

II. Sufficiency of the Evidence

In determining appellant's income the Government used both the expenditure and net worth methods. The two computations are merely accounting variations of the same basic method, the expenditure theory being an outgrowth of the net worth method. U. S. v. Caserta, 3 Cir. 1952, 199 F. 2d 905. Both involve a determination of the taxpayer's net worth at the beginning and end of a period in order to foreclose the possibility that the expenditures were made or the net worth increases

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were derived from prior accumulated funds. The underlying theory of the expenditure method is that if expenditures exceed reported income for the period and net worth has remained constant or changes otherwise accounted for, an inference may be drawn that total income was not properly reported. The theory of the net worth method is that if a taxpayer's net worth at the end of a particular period is greater than his net worth at the beginning of the period, and such increment is not attributed to gifts, devises, loans, or other non-income sources, the conclusion may be drawn that the increase in net worth represents income to the taxpayer. The net worth and expenditure computations of the Government both tended to show that appellant had failed to report taxable income of $79,911.23 in 1945 and $70,769.76 in 1946.

Appellant does not deny that his expenditures for the two years in question greatly exceeded his reported gross incomes. He asserts, however, that the Government's case must fall because it failed to establish a firm starting point for its determination of his net worth. He challenges the accuracy of the prosecution's computations first on the ground that the Government failed to exclude the hypothesis of funds other than income from which the substantial expenditures could have been made, and second, on the ground that certain known assets were omitted from the net worth statements.

Appellant contends, and we agree, that in a net worth case the Government must establish with a reasonable degree of accuracy the taxpayer's net

worth at the beginning and end of the period in question. We think this requirement was fully and adequately met in this case. There is no exclusive set of circumstances to foreclose the prior accumulation hypothesis. How much evidence must be offered by the prosecution before the trial court can properly submit the case to the jury depends upon the facts of the particular case. Remmer v. United States, 9 Cir., May 28, 1953, ... F. 2d ..... The Government is not required to refute all possible speculations as to the sources of funds from which the expenditures might have been made. Gariepy v. United States, 6 Cir. 1951, 189 F. 2d 459. We view the evidence in the light most favorable to the Government and affirm if the evidence is sufficient to justify the jury in finding therefrom, beyond a reasonable doubt, that there has been a wilful attempt to evade taxes. Gendelman v. United States, 9 Cir. 1951, 191 F. 2d 993.

In the instant case the establishment of appellant's net worth as of the beginning of the year 1945 was thorough and in detail. The revenue agents began their inquiry with the year 1935 and traced appellant's financial history through 1946. There was evidence that in 1934 and 1935 appellant moved from a $1.50 a day hotel room to the back room of a cinderblock building where he cooked his own meals to save expenses, that he was employed in a meat market at $50 to $60 a week, that he began the operation of North Idaho Sales Company about 1936 in partnership with his daughter with a maximum capital investment of $2,000, that

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the bank account was not always sufficient to cover a $12 a week check paid to an employee, that he filed no income tax returns in Idaho prior to 1936. From these facts the jury was entitled to infer that appellant was not in the possession of substantial assets as of the year 1935. The Government produced appellant's income tax returns and established the amount of income reported for the years 1936 to 1945 to negative the likelihood of his having accumulated a large surplus in those years. The agents examined appellant's records and books, bank accounts, court and county records to determine if there were any other possible sources of funds. He was given credit for all known borrowings and such amounts were eliminated from the income computations. The investigation was as full and complete as the Government could be reasonably required to make.

This evidence is substantial. The net worth computation was necessarily an estimate but, as such, was competent for the consideration of the jury. The Government's case is not destroyed by argumentative speculation, unsupported by evidence, that he might have had other substantial assets not taken into account by the Government. Appellant's voluntary admissions to the revenue agents that he had received no inheritances, that he had no other source of income than the known assets, and that $50,000 was all he had on hand as of January 1, 1942, serve only to corroborate the accuracy of the net worth statements.

Another argument of appellant in which we find

no substance is that there was fatal variance because the Government did not establish the exact source of the unreported income. The law is clear that proof of the exact amount or precise source of unreported income is not required. Jelaza v. United States, 4 Cir. 1950, 179 F. 2d 202; Gariepy v. United States, 6 Cir. 1951, 189 F. 2d 459. The jury was entitled to infer from the evidence that the unreported income came from one or all of the sources specified in the bill of particulars.

Appellant further attempts to attack the accuracy of the net worth statements by showing that certain known assets were omitted. There was testimony that the revenue agents were advised that appellant in 1943 personally had on hand approximately $114,000 in cash which he spent for liquor and which was not recorded on his business books. Substantial evidence appearing in the record justifies the inference that no such asset existed. The revenue agent testified that he did not give appellant credit for this item because it represented numerous purchases of whiskey and not a single transaction. Any whiskey on hand in 1945 was included in the net worth statement as inventory. He further testified that appellant informed him that this item would be accounted for on the Foresters Club books and that it related to whiskey inventory turnover. The contradictory and highly questionable testimony of R. E. McDonnell was the only affirmative evidence concerning this transaction. At one point during his testimony the trial court found it necessary to caution the witness against testify-

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ing falsely. The jury no doubt disbelieved McDonnell.

Two other items allegedly improperly omitted need no extended treatment since, even if we were to assume that appellant's contention is correct, the total amount involved could not affect the result. The challenged items amount to approximately $23,000 whereas the Government computations disclose a failure to report approximately $80,000 in 1945 and $70,000 in 1946. The Government is not required to prove the defendant's guilt to a mathematical certainty. Schuermann v. United States, 8 Cir. 1949, 174 F. 2d 397.

Appellant also claims that the two net worth statements were highly prejudicial to him because they both contain entries showing that he paid no income tax in 1945 or 1946 when in fact he did pay taxes for these two years. It is true that appellant overpaid his income taxes in 1944 and received a credit of $25,879.94 which was applied to his 1945 and 1946 taxes. The record does not disclose the year in which he received the income tax credit. Appellant concedes, however, that the treatment given this item by Government accounts had no affect whatever on the net worth computation. His complaint is that it was prejudicial to send to the jury statements which showed that he had paid no federal income tax during the two years in issue. We find no merit in this contention. It is clear that the jury had before it abundant evidence that appellant had paid taxes in these years. Appellant himself introduced a letter from the Treasury De-

partment crediting him with the overpayment of his taxes. His income tax returns were in evidence and there was testimony by a revenue agent that appellant had applied the tax refund to his 1945 and 1946 taxes.

III. Confidential Communications

Two lawyers, Messrs. Keane and Stern, who had on different occasions represented appellant, were called as witnesses by the Government and requested to testify. They made objection on the ground that the matters concerning which they were questioned were privileged because at that time the relationship of attorney and client existed between them and appellant. Their objections were overruled and answers were then given. Lawyer Keane testified to the effect that he had obtained $12,500 in currency from appellant on January 28, 1946, with instructions to purchase a cashier's check; that he had his secretary do so, and that another $3,000 check was handled the same way. On March 21, 1946, he received another $9,000, mostly in currency, of which he paid $7,500 for a cashier's check and gave $1,500 to Stern. He also testified about a $5,500 note receivable and a $4,700 check payable to McDonald, for which appellant advanced funds.

Lawyer Stern testified to the effect that he deposited $12,500 in the Dakota National Bank at Fargo, North Dakota, which was used partially to make payments to the District Court of the United States. He testified that he cashed a $3,000 check and gave the funds to appellant.

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The Government's purpose in eliciting the evidence from the lawyers was to show as a part of the expenditures that the sum of $16,500 was used by appellant in payment of fines in 1946.

We see no confidential relationship between attorney and client in the above transaction. The attorneys acted in the capacity of a transmitter, not as lawyers giving legal advice. The lawyers stand in the same relation as would a banker had one been commissioned by appellant to carry out what appears to be no more than clerical and messenger service. Pollock v. United States, 5 Cir. 1953, 202 F. 2d 281; cf. United States v. De Vasto, 2 Cir. 1931, 52 F. 2d 26.

IV. Failure of Court to Give Requested Instructions on Circumstantial Evidence

Appellant assigns as error the failure of the Court to give a requested instruction on circumstantial evidence.

Appellant makes a statement on page 21 of his brief that he excepted to the instructions given by the Court on circumstantial evidence. After setting out the instructions given by the Court it is stated:

"Counsel for defendant excepted to the above instructions as follows:

"Mr. Emigh: We would like an exception to the failure of the Court to give the requested instruction that not only must the evidence prove guilt but that it must prove the hypothesis of guilt to the exclusion of all other hypotheses.

"The Court: You may have your exception."

It is apparent that the exception was directed to

a requested instruction not given by the Court and not to the instructions given. The instructions given by the Court on circumstantial evidence, to which no exception was taken, states the law with much more clarity and force than does the alleged proffered instruction which the Court rejected. The jury was adequately instructed on this point.

V. Comment of the Court

During the course of its instructions to the jury the Court stated:

"You are instructed that if you find substantial evidence outside of the defendant's own statements consisting of increase of net worth during the taxable years or any absence of personal records or books of account or the failure of books and records to show fully its transactions or those of the defendant then this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through whatever means he might do so.

"I don't want to comment on the evidence but there is one outstanding matter that you are left in the dark about, I don't intend to make any inference about it, as the evidence here is solely for you. But where are the tickets that should show the receipts and division of the money taken from the slot machines for the years 1945 and 1946. There was only one of these books of tickets introduced in evidence by the defense. None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were

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traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with the bank account that it would have been an easy matter for the defense to produce the tickets if they have not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?"

Appellant objected to the statements of the Court concerning the "tickets" and has assigned it as error.

The Court further charged the jury as follows:

"Ladies and Gentlemen of the Jury; when I instructed you I made some comment concerning the failure of the defendant to produce these sales slips or tickts, check on the slot machines, or receipts from the slot machines. You understand that you are not to draw any inference from the Court's remarks, these are questions of fact for the jury, and you are not to be influenced by any remarks by the Court as to what the Court thinks about the testimony."

And the Court gave the further cautionary instruction:

"If the Court has inferred, or if you should have gathered during the trial of the case that the Court has some opinion as to the facts in this case you will disregard that entirely. The matter of the guilt or innocence of the defendant as based on the facts presented to you here is a matter for your determination and yours alone and the Court has not intended to infer at any time that he had any feeling on the matter."

Other instructions were given where the function of the jury to pass upon the facts of the case was stressed.

Viewing the instructions of the Court as a whole, the statements complained of were not beyond the bounds of judicial propriety. United States v. Aaron, 2 Cir. 1951, 190 F. 2d 144, cert. denied, sub nomine Freidus v. United States, 342 U.S. 827; Todorow v. United States, 9 Cir. 1949, 173 F. 2d 439, cert. denied, 337 U.S. 925; Simon v. United States, 4 Cir. 1941, 123 F. 2d 80, cert. denied, 314 U.S. 694. It is obvious that the jury was clearly informed that it was left free to perform its fact-finding functions.

VI. Admissibility of Evidence of Admissions

Error is claimed in the admission of the testimony of agents of the Bureau of Internal Revenue as to statements made to them by appellant. This testimony, asserts appellant, was inadmissible because there is in the record no substantial independent proof of the corpus delicti. A reading of the record convinces us that not only does the independent evidence substantially corroborate the admissions (which in this circuit is sufficient, Davena v. United States, 9 Cir. 1952, 198 F. 2d 230), but, contrary to appellant's contention, goes further and establishes the corpus delicti by competent independent evidence.

Judgment affirmed.

[Endorsed]: Opinion. Filed Aug. 24, 1953. Paul P. O'Brien, Clerk.

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United States Court of Appeals
for the Ninth Circuit

No. 13,482

AUSTIN F. McFEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Idaho, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho, Northern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is, affirmed.

Filed and entered August 24, 1953.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 457 pages, numbered from and including 1 to and including 457, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 18th day of September, 1953.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

No. 914, October Term, 19~~53~~

AUSTIN McFEE,

Petitioner,

vs

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including ~~October 23~~, 19~~53~~.

S/ Tom Clark
Associate Justice of the Supreme Court of the United States

Dated this ~~17th~~
day of ~~September~~, 19~~53~~.

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Office - Supreme Court, U.S.
FILED
OCT 15 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1953

No. ~~414~~ 15

AUSTIN F. MCFEE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ELDEN MCFARLAND
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Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1953

No.

AUSTIN F. MCFEE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Austin F. McFee prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on August 24, 1953, affirming the judgment of the United States District Court for the District of Idaho, Northern Division.

Opinion Below

The opinion of the Court of Appeals (R. 444) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered August 24, 1953. The jurisdiction of this Court is invoked under section 1254(1) of Title 28, United States Code, and

section 2101(d) Title 28, United States Code, and section 37(b)(2) of the Rules of Criminal Procedure for the United States District Courts.

Questions Presented

1. Where the prosecution's proofs of the essential elements of a criminal case were dependent upon circumstantial evidence, and where there was substantial evidence upon which a reasonable hypothesis of innocence could be predicated, and where the trial court did not charge the jury that, in order to convict the defendant, the evidence not only should establish guilt, but also should exclude every reasonable hypothesis of innocence, and such omission was called to the attention of the court and an exception noted, and where, after eight hours of deliberation the jury was unable to agree on a verdict and requested the court to repeat its instructions on circumstantial evidence and the court then instructed the jury that circumstantial evidence is competent evidence and should be given such weight as the jury may determine, and is sufficient to uphold a conviction, and the jury then retired and brought in a verdict of guilty shortly thereafter, did the court err in failing to instruct the jury as to the circumstantial evidence rule, referred to above?

2. Were the trial court's incomplete and inadequate instructions on circumstantial evidence, given to the jury upon the latter's request after some eight hours of deliberation, cured of their defects by reason of the unilluminating previous instructions originally given to the jury prior to its first retirement?

3. Where certain temporary collection records, after recordation in the books of account had been turned over to the defendant in 1945 and 1946 (the record being silent as to whether such temporary records were still in existence at the time of the trial in 1952), and where all of such temporary records, if still in existence and if produced by

the defendant, might have either corroborated or discredited the testimony of eight of defendant's witnesses to the effect that all of such income transactions had not been handled by the defendant but had been handled, or recorded on the books of account, by such employees and where the defendant himself, obviously was the only witness who could have established that such records, if produced, were all the records that he received or who could have established what he had done with such records, if not produced, did the comments of the trial court to the jury, stating that the defendant's failure to produce or account for such records was an "outstanding matter" which the jury should consider (a) invade the defendant's right under the Act of March 16, 1878, c. 37, 20 Stat. 30, now 18 USCA, sec. 3481, to refrain from testifying without adverse presumption arising therefrom, or (b) invade the defendant's constitutional right under the Fifth Amendment not to be a witness against himself?

Statutes Involved

Title 26, USCA, Sec. 145(b): Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Title 18, USCA, Section 3481:

Competency of accused.—In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make

such request shall not create any presumption against him. (June 25, 1948, c. 645, Par. 1, 62 Stat. 833.)

Fifth Amendment to the Constitution:

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement

The petitioner, McFee, was indicted, tried by a jury, convicted, sentenced to imprisonment and fined for wilful attempt to defeat and evade income taxes due and owing by him for each of the years 1945 and 1946 in violation of section 145 (b) of the Internal Revenue Code, 26 USC, Sec. 145(b). The imprisonment on the second count (for the year 1946) was conditionally suspended. Defendant is now on bail.

The theory of the prosecution's case was that the petitioner, who was engaged in the operation of coin operated machines known as slot machines, phonograph machines, pinball machines, and vending machines in Northern Idaho, and who also operated a tavern, had in some unknown manner obtained unreported proceeds from the coin operated machines.

1. The prosecution's proofs as to unreported income and as to wilfulness were based wholly on circumstantial evidence, being presented in the form of "unexplained" expenditure and net worth computations (R. 241, 245). There was no direct evidence showing or tending to show that

the petitioner received or had access to any amount, or any known source, of unreported income. There was no evidence as to any error in his books of account either as to gross income or deductions, or otherwise. There was no evidence of unexplained bank deposits. There was no evidence of, or reference, to any scheme or device which was, or might have been, used by the defendant. The only evidence was that the defendant had "unexplained expenditures" during the taxable years, in excess of his income, and from sources unknown (R. 242, 252-253).

Evidence produced by the prosecution showed that the defendant claimed that he had had cash on hand which was not included in the Government's expenditures and net worth computations (R. 264, Exhibits 49 and 50) and that petitioner had spent $114,000 for assets in 1943, which also were not included in such computations (R. 263, Exhibits 49 and 50) and which could have been on hand or converted into cash immediately prior to or during the taxable years.

The defendant's evidence showed (1) That the defendant had been in business for many years prior to the year of the basic starting point for the prosecution's net worth computation; (2) that the defendant had a large amount of cash on hand in a safe during the taxable years which was not taken into account in the government's computations, (R. 395) (3) that he did not handle or have access to any of the gross receipts of his coin operated machines (which under the theory of the prosecution was the source of the unreported income) or of his tavern, or taverns, until after its collection and recordation in the books of account by his employees (R. 297, 302, 327, 335, 361, 398 and 209); and (4) that he spent $102,700 in cash in 1943 for assets which were not taken into account in the government's net worth or "expenditures" computations (R. 307, 324). These assets or their cash conversion equivalent were not shown to have been dissipated by 1945. This evidence, if believed, was sufficient to establish the defendant's innocence.

The trial court's instructions to the jury, touching upon circumstantial evidence, were as follows:

> ". . . You are bound by your oaths to accept the instructions of this Court as the law in the case." (R. 415)
>
> • • • • • • • • • •
>
> "The Government has attempted to establish the defendant's income for the years 1945 and 1946 by showing that he accumulated more and spent more in these years than he reported on his tax returns. This is in the nature of circumstantial evidence. Therefore, you should consider whether or not the Government has precluded every reasonable source of these funds except earnings for the years charged. However, the Government is not required to refute all possible speculation as to the source of these funds." (R. 420)
>
> • • • • • • • • • •
>
> "Evidence is of two kinds, positive and circumstantial. Positive or direct evidence is said to be when the witness testifies directly out of his own personal knowledge to the matters in issue. Evidence is circumstantial when a witness testifies to matters having only an indirect or circumstantial bearing upon such issue.
>
> "Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.
>
> "You are instructed that throughout this proceeding the counsel for defendant has asserted that he may have accumulated money in previous years with which to make such investments and impliedly, out of unexplained income. In a prosecution for attempting to evade income taxes by filing false and fraudulent returns where government relies upon net worth method to establish defendant's income, the Government is not required to refute all possible speculation as to the source of defendant's asserted funds." (R. 421-422)

At the conclusion of the court's instructions, counsel for defendant stated (R. 424):

> "Mr. Emigh: We would like an exception to the failure of the Court to give the requested instruction

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that not only must the evidence prove guilt but that it must (427) prove the hypothesis of guilt to the exclusion of all other hypotheses.

"The Court: You may have your exception."

* * * * * * * *

After eight hours of deliberation the jury returned to the court room at 8:30 p.m. and the following proceedings were had (R. 425-6):

"The Court: You have been deliberating for some eight hours, have you been able to agree upon a verdict:

"Foreman: Not yet.

"The Court: Is there any assistance the Court can give you? I don't want to know what the Jurors think but is there any questions you have?

"Foreman: Yes, the question of circumstantial evidence, we would like that instruction.

"The Court: Would you like me to give that again?

"Foreman: Yes.

"The Court: I will read the instruction. Would you like all the instructions again?

"Foreman: Just as to circumstantial evidence.

"The Court: Evidence is of two kinds, positive and circumstantial. Positive or direct evidence is said to be when the witness testifies directly out of his own personal (428) knowledge to the matters in issue. Evidence is circumstantial when a witness testifies to matters having only an indirect or circumstantial bearing upon such issue.

"Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.

"Either positive or circumstantial evidence will uphold a conviction.

"Is there any other part of the instructions you would like?

"Foreman: That is all."

The jury thereupon retired and brought in a verdict of guilty shortly thereafter (R. 32).

2. The collections from the coin operated machines were made by employees who recorded all collections in triplicate in little books referred to by the Court as "books of tickets." The machines were locked and McFee did not have a key. One copy was given to the location owner who received one-half of the proceeds and receipted for his half. Another copy was turned over to petitioner's manager of that particular area together with the cash which was reconciled with the "tickets", deposited in bank and recorded on the books of account. The third triplicate copy was turned over to McFee. The record is silent as to whether McFee retained these temporary records or "books of tickets" up to the time of trial. A blank book of tickets was received in evidence as Exhibit No. 39 at the time of trial for illustrative purposes (R. 207).

The Court, commenting on the evidence said (P. 417):

> "You are instructed that if you find substantial evidence (419) outside of defendant's own statements consisting of increase of net worth during the taxable years or any absence of personal records or books of account or the failure of books and records to show fully its transactions or those of the defendant then this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through whatever means he might do so.
>
> "I don't want to comment on the evidence but there is one outstanding matter that you are left in the dark about, I don't intend to make any inference about it, as the evidence here is solely for you. But where are the tickets that should show the receipts and division of the money taken from the slot machines for the years 1945 and 1946. There was only one of these books of tickets introduced in evidence by the defense. None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with the bank account that it would have been an easy matter for the defense to produce the tickets if they have

not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?"

Thereafter the following proceedings were had (R. 424):

"The Court: Does the defendant wish to register any exceptions to the instructions as given?

"Mr. Purdy: Regarding the instruction in which the Court made some comment as to the collection books.

"The Court: You will have to specify what your exceptions are.

"Mr. Purdy: We except to the portion of the Court's instruction in relation to the failure of the defendant to retain the sales slips, or collection slips.

"The Court: You may have your exception.

(In the presence of the jury.)

"The Court: Ladies and Gentlemen of the Jury: when I instructed you I made some comment concerning the failure of the defendant to produce these sales slips or tickets, check on the slot machines, or receipts from the slot machines. You understand that you are not to draw any inference from the Court's remarks, these are questions of fact for the jury, and you are not to be influenced by any remarks by the Court as to what the Court thinks about the testimony."

3. On appeal the defendant-appellant urged, among other things,

(1) That the trial court erred in not instructing the jury that in order to sustain a conviction the evidence must be consistent with guilt and inconsistent with every reasonable hypothesis of innocence.

(2) That the trial court's supplemental instruction to the jury on circumstantial evidence was wholly inadequate and prejudicial (Resp. br. pp. 83-84); and

(3) That the trial court's comments to the jury that they should consider as an "outstanding" circumstance the failure of the defendant to account for or produce the temporary records traced to his possession, was erroneous and prejudicial.

The Court of Appeals held:

(1) That the jury was adequately instructed with clarity and force on the subject of circumstantial evidence (R. 453);

(2) It did not comment on, but glossed over, the supplemental or "last minute" instructions (R. 453-4); and

(3) It held that the comments of the trial court were proper and not prejudicial (R. 454).

REASONS FOR GRANTING THE WRIT

I.

There is a lack of uniformity among the Courts of Appeals for the several Circuits in the application of the circumstantial evidence rule.

A defendant in the Ninth Circuit has a far greater handicap in a criminal case based on circumstantial evidence than a defendant in most of the other circuits. Even though specifically requested by the defendant, a trial court in the Ninth Circuit need not instruct a jury in a criminal case, where vital portions of the prosecution's case are dependent on circumstantial evidence, that in order to sustain a conviction the evidence must not only be consistent with guilt but also inconsistent with every reasonable hypothesis of innocence.

On the other hand, in the recent Fifth Circuit case of *Bryan* v. *United States*, 175 F. (2d) 223, 226, the court in reversing the lower court, said:

> "The evidence, being circumstantial must exclude every reasonable hypothesis other than the guilt of the defendant."

Similarly in *Anderson* v. *United States* (5 Cir.) 30 F. (2d) 485, 487, the same Court said:

> "It is a fundamental rule of evidence that in order to support a conviction, circumstantial evidence must

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> exclude every reasonable hypothesis other than that of guilt."

If that is a correct statement of law, a defendant in the Ninth Circuit is entitled, in a similar case, to have an instruction so stating, given to the jury. The court denied the defendant that right in the present case. Both the *Bryan* case, *supra,* and the present case, involved income tax prosecutions based on "net worth" computation and in both there was a basis for a reasonable hypothesis of innocence.

This divergence as between circuits, prompted Judge Goodrich to suggest, in *United States* v. *Dolasco,* (3 Cir.) 184 F. (2d) 746, 748, that the circumstantial evidence rule may be *"archaic and based on mistaken premises."* In support of his observation he cited, *McCoy* v. *United States,* (9 Cir.) 169 F. (2d) 776, 784, and *United States* v. *Becker,* (2 Cir.) 62 F. (2d) 1007, 1010, and Wigmore, Evidence sec. 26, (3rd Ed. 1940).

Prior to its decision in *McCoy* v. *United States, supra,* the Ninth Circuit had recognized and followed the circumstantial evidence rule stated above, *Paddock* v. *United States,* 79 F. (2d) 872, 876; but the latter case was specifically overruled by *McCoy* v. *United States, supra.* Since that time the Ninth Circuit has followed the rule that where a general instruction in proper form on "reasonable doubt" is given, the circumstantial evidence instruction need not be given to a jury, even though requested by the defendant and even though the prosecution's case is entirely dependent upon circumstantial evidence, and the evidence could support a reasonable hypothesis of innocence.

In the present case the Court of Appeals has gone even further than it did in *McCoy* v. *United States, supra.* In the *McCoy* case the evidence was not entirely circumstantial; there was some direct evidence of guilt. In the present case there was none. The evidence of guilt was *wholly* circumstantial, and there was evidential support for a reasonable hypothesis of innocence. Furthermore, in the

McCoy case, the instructions taken as a whole, were deemed to be adequate, whereas in the present case the instructions, particularly the supplemental instructions on circumstantial evidence given after eight hours of deliberation, were wholly inadequate (R. 425).

With respect to the differences between the Circuits, Judge Goodrich pointed out in *United States* v. *Dolasco, supra,* (184 F. (2d) 746, 748) that the Third Circuit as well as some other circuits strictly adhere to the circumstantial evidence rule but that there was no occasion to re-evaluate the rule in that case because the circumstantial evidence instruction had been given to the jury.

Strict adherence to the rule is illustrated by the following cases:

Fifth Circuit

Bryan v. *United States,* 175 F. (2d) 223, 226
Strickland v. *United States,* 155 F. (2d) 167, 168
Thompson v. *United States,* 145 F. (2d) 826, cert. den. 324 U.S. 861, 65 S. Ct. 866, 89 L. Ed. 1418
Anderson v. *United States,* 30 F. (2d) 485, 487

Sixth Circuit

Epstein v. *United States,* 174 F. (2d) 754, 769
McLendon v. *United States,* 13 F. (2d) 777, 779

Seventh Circuit

Fenwick v. *United States,* 177 F. (2d) 488, 490

Eighth Circuit

Banks v. *United States,* 204 F. (2d) 666, 672
Gurera v. *United States,* 40 F. (2d) 338, 340

Tenth Circuit

Stryker v. *United States,* 95 F. (2d) 601, 604

The foregoing cases show that there is a distinct lack of uniformity between the Courts of Appeals for the Ninth

and probably the Second Circuits on the one hand, and the Courts of Appeals for the Third, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, on the other hand, as to the required degree of adherence to the circumstantial evidence rule. In the former circuits the general instruction on "reasonable doubt" will suffice, while in the latter circuits the circumstantial evidence instruction must be given, when requested, in a case dependent upon circumstantial evidence.

The present case presents an excellent medium for clarification of the rule, for this defendant clearly was prejudiced by the supplemental instructions on circumstantial evidence given by the trial court at their request. The jurors, who for eight hours had held out for acquittal, were quickly silenced by the trial court's instruction (1) that circumstantial evidence is competent evidence, (2) that it is sufficient to convict, and (3) that they were the sole judges of its weight (R. 425). The defendant might well have been acquitted had his trial been held in another circuit where the circumstantial evidence rule is recognized and strictly adhered to.

The question is one of general importance. Current case reports confirm the common knowledge of the pendency of a substantial number of criminal cases, particularly tax cases based upon "net worth" and "expenditures" computations. Such cases depend on circumstantial evidence. There should be uniformity among the several circuits as to the applicability of the circumstantial evidence rule.

II.

The decision of the court of appeals is probably in conflict with the decision of this court in Bollenbach v. United States, 326 U. S. 607, 612, in that the inadequate supplemental instruction on circumstantial evidence was not cured by a prior "unilluminating abstract charge" in the original instructions.

In *Bollenbach* v. *United States,* 326 U.S. 607, 612, 66 S. Ct. 402, 405, 90 L. Ed. 350, this court said:

> "... jurors are ever watchful of the words that fall from him (the trial judge). Particularly in a criminal trial, the judges last word is apt to be the decisive word. *If it is a specific ruling on a vital issue, the error is not cured by a prior unexceptional and unilluminating abstract charge.*" (Italics added)

In the present case the jury, being unable to agree after eight hours of deliberation, returned to the court room and requested further instruction on circumstantial evidence. The court then defined circumstantial evidence and instructed them (1) that circumstantial evidence is competent evidence, (2) that it is to be given such weight as the jury determines it is entitled to, and (3) that it will uphold a conviction. (R. 425). The jury then retired and, shortly thereafter, brought in a verdict of guilty (R. 32).

On appeal the defendant-appellant urged the inadequacy of the original instructions *as well as the supplemental instructions* on circumstantial evidence as ground for reversal (Appellant's Brief, pp. 81, 84-85). The appellate court did not mention the supplemental instructions in its opinion. It held that the instructions as a whole on circumstantial evidence stated the law with "clarity" and "force" and that "the jury was adequately instructed on this point." (R. 454)

The trial court did not state the circumstantial evidence rule to the jury in its original instructions, although requested by the defendant (see p. 7, supra, and R. 420, 424, 425). It covered the rule, if at all, by indirection. It

told the jury that they "should consider whether or not the government had precluded every reasonable source of these funds except earnings for the year charged" (R. 420), but the court did not tell the jury what to do, after they so "considered." It did not tell the jury that in order to sustain a conviction the evidence must not only be consistent with guilt, but also inconsistent with any reasonable hypothesis of innocence. Furthermore, the *supplemental* instructions were wholly inadequate. Even under the rule followed in the Ninth Circuit, the supplemental instructions would have to be reinforced or supplemented by the original instructions on "reasonable doubt" in order to be adequate. The original instructions, obviously, were not clear to the jury because they asked specifically for further instructions on circumstantial evidence. The requested supplemental instructions were on a vital issue—the one issue upon which the jury was in disagreement. Under the rule stated by this court in *Bollenbach* v. *United States, supra,* the supplemental instructions on a vital issue must stand on their own feet. Their inadequacy is "not cured by (the) prior . . . unilluminating abstract charge."

While the record (R. 426) does not show that an exception was taken to this supplemental instruction it is apparent that such a proceeding would have been useless. The failure to instruct as to the circumstantial evidence rule had already been called to the attention of the court during the course of the original instructions and the request had been denied and an exception noted (R. 424). Under such circumstances this Court may notice the error. *Screws* v. *United States,* 325 U.S. 91, 107, 65 S. Ct. 1031, 1038, 89 L. Ed. 1495; *Johnson* v. *United States,* 318 U.S. 189, 200, 63 S. Ct. 549, 555, 87 L. Ed. 704, particularly where it was urged on appeal and concerned the one issue which the jury considered to be the vital point in the case. See also, *United States* v. *Raub* (7 Cir.) 177 F. (2d) 312, 315. A conviction ought not rest on an equivocal direction to the

jury on a basic issue. *Estep* v. *United States,* 327 U.S. 114, 145, 66 S. Ct. 423, 438, 90 L. Ed. 567.

III.

There is a probable conflict between the decision of the Court of Appeals in the present case and the decisions of the Supreme Court in Bruno v. United States, 308 U.S. 287, 293, 60 S. Ct. 198, 200, 84 L. Ed. 257, and Wilson v. United States, 149 U.S. 60, 13 S. Ct. 765, 37 L. Ed. 650, in that the trial court's comments to the jury raised an adverse presumption against the defendant for failing to take the witness stand in his own defense.

The comments of the trial court and the exception thereto are set forth in full at page 8 hereof. In effect, the court told the jury that the defendant's failure to testify regarding certain temporary records referred to as "books of tickets" was, in its opinion an "outstanding matter" which they should consider. The Court pointed out that these "books of tickets" had been traced to the defendant's personal possession (in 1945 and 1946). Obviously, he was the only person who could account for his own disposition thereof—or if he had produced them he was the only person who could have testified that the books of tickets produced were *all* of the books which he received. There would be no point in merely producing those books which his own witnesses had testified had been properly recorded in his books of account. The point was that the court suspected that there may have been other "books of tickets" not recorded (although there was not the slightest evidence on this point). There was no witness, other than the defendant, who could have covered this point. The logical inference to be drawn by the jury from the court's remarks was that the defendant's failure to testify on this point was an "outstanding matter" giving rise to an adverse presumption. Thus the trial court did, indirectly, that which is specifically proscribed by Title 18 USCA, sec. 3481, which provides that a defendant's failure to testify shall not create any presumption against him.

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In *Wilson* v. *United States,* 149 U.S. 60, 13 S. Ct. 765, 37 L. Ed. 650, this Court held that neither the court nor the prosecution may by obvious indirection, raise such an adverse presumption. The latter case is cited with approval in *Johnson* v. *United States,* 318 U.S. 189, 196, 63 S. Ct. 549, 553, 87 L. Ed. 704.

In *Bruno* v. *United States,* 308 U.S. 287, 292, 60 S. Ct. 198, 200, 84 L. Ed. 257, this Court held that pursuant to the provisions of 18 USCA, sec. 3481, (formerly 28 USCA Sec. 632), the defendant in a criminal case has the right to have his failure to take the witness stand "not tell against him."

If the comments of the court be construed as we have construed them, which, we submit, is their fair import to the jury, the decision of the Court of Appeals in the present case is in conflict with both *Wilson* v. *United States, supra,* and *Bruno* v. *United States, supra,* and is adequate ground for reversal.

Furthermore, there was absolutely no evidence in the case, whether direct or indirect, which established, or which tended to establish, that the defendant obtained any amount of unreported income whatever during the years in issue from the coin operated machines (which was the source upon which the theory of the prosecution was premised) or from any other source designated in the government's Bill of Particulars.

There was no evidence, direct or indirect, of any irregularity in defendant's books of account, or in operation of his business during the years in issue, or in the manner of handling the "books of tickets." The latter were temporary records, not normally preserved by businessmen and not required by regulation or law to be preserved.

The comment of the trial court could not do otherwise than create in the minds of the jurors the impression that it was incumbent upon the defendant to establish his innocence by proving a negative when the positive had not been established by the prosecution. Its effect was to re-

quire him to demonstrate that he had *not* received any unreported income from this particular source, when the prosecution had never established, directly or indirectly, that he had received any such income from such source, or any other source. The comment was erroneous and highly prejudicial.

IV.

The trial court's comments referred to in III above were in derogation of the defendant's constitutional right under the Fifth Amendment not to be a witness against himself.

The exercise of the defendant's constitutional privilege, not to be a witness against himself "would be a mockery of justice if either party is to be injuriously affected thereby." *Johnson* v. *United States,* 318 U.S. 189, 197, 63 S. Ct. 549, 553, 87 L. Ed. 704. The effect of the trial court's comment was to call the attention of the jury to the failure of the defendant, himself, to account for certain temporary records traced to his personal possession some seven or eight years prior to the trial. The defendant could do this only by taking the witness stand. The fair import of the comment is that defendant's failure to do so was an "outstanding matter" to be considered by them. Such comment, we submit, was in derogation of the defendant's constitutional right and was highly prejudicial.

Conclusion

For the reasons stated above, petitioner respectfully requests that his petition be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 15

AUSTIN F. McFEE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO FILE FURTHER SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The petitioner moves for leave to file the attached Further Supplement to Petition for Writ of Certiorari; and in support thereof states:

The opinions of this Court handed down December 6, 1954, in the cases of *Marion L. Holland, et al.* v. *United States of America* (No. 37), *David Friedberg* v. *United States of America* (No. 18), *Daniel Smith* v. *United States of America* (No. 52) and *United States of America* v. *Edward B. Calderon* (No. 25) have resolved several uncertainties in the law and have clarified the nature of, and controlling standards applicable to the establishment of taxable income by the use of the "net worth" method.

These are circumstances of substantial and controlling effect which have intervened since the Petition for Writ of Certiorari in this cause was filed on October 23, 1953.

WHEREFORE, petitioner prays that the foregoing motion be granted.

ELDEN MCFARLAND
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Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 15

AUSTIN F. McFEE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

FURTHER SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

This case illustrates some of the dangers or pitfalls in the use of the net worth method of establishing taxable income which were enumerated in the opinion of Mr. Justice Clark, speaking for this Court, handed down December 6, 1954, in the case of *Holland* v. *United States of America* (No. 37).

1. The Government Did Not Establish a Likely Source of the Alleged Net Worth Increase.

In the case of *Holland* v. *United States, supra,* this Court stated:

> (1) "There is great danger that the jury will assume that once the Government has established the figures in its net worth computations, the crime of tax

> evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; * * * "

In the present case, the Government investigating agents, Olsen and Rice, after a rather limited investigation of leads which would have explained the source of petitioner's "unexplained" expenditures made net worth computations for each of the two prosecution period years (1945 and 1946) and presented four charts (Exhibits 47, 48, 49 and 50—R. 241, 246) which were handed to the jury (R. 242) and which undoubtedly were available to the jury during its deliberations. A copy of the net worth statements contained in Exhibits 49 and 50 is set forth in the appendix hereto.

Thus we have in this case, a setting which may well be fraught with the "great danger" alluded to by this Court.

In *Holland* v. *United States, supra,* this Court also stated (p. 15 of the printed opinion):

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang is sufficient."

The source of the alleged unreported income in the present case as set forth in the Bill of Particulars was "limited to those sources reported by the defendant for income tax purposes for said years" 1945 and 1946 (R. 17). Those sources were (1) North Idaho Sales Company a sole proprietorship during 1945 and 1946 which was engaged in the business of operating vending machines, and amusement machines, and other coin operated machines in various locations in northern Idaho and (2) the operation of three taverns for the first half of the year 1945, and thereafter one tavern, known as the Foresters Club, at

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Lewiston, Idaho. There were one or two other ventures but they were loss ventures, and were not of any importance as a possible source of income. The source actually suspected by the Government was from the coin operated machines operated by North Idaho Sales Company.

But the evidence, adduced by the Government not only failed to show that petitioner received as much as one penny of unreported income from any source whatever, but it failed to show that petitioner *had access to* any known source of unreported income.

Petitioner did not personally operate his business. All cash or other receipts from the taverns were handled and recorded by employees. All receipts were rung up on the cash register and the register tapes were balanced against cash daily. The cash was deposited in bank and the records were sent in daily to the central office where they were again checked and balanced and were entered in the permanent records (R. 301, 325). And as far as the coin operated machines were concerned the evidence affirmatively shows, without conflict, that all collections were made and recorded by employees, and deposited in bank by employees and that those machines were locked and that petitioner did not have a key thereto.

There was absolutely no evidence, direct or indirect, which showed or tended to show that petitioner received, or ever had the opportunity to receive, any amount of unreported or unrecorded income either from the designated sources, or the suspected source or any other source during the prosecution period.

On the contrary one of the Government's own witnesses, Emasio, testified that there was no way in which petitioner could have withdrawn funds from his business without such withdrawals being recorded in his drawing account. (R. 70-71). This testimony strongly tends to negative such a source.

Furthermore the Government agent, Olsen, specifically stated that the source of the money used for the so-called

unexplained expenditures was unknown (R. 242, 244); and that if petitioner had had cash on hand prior to the prosecution period, the expenditures could have come from that source (R. 254).

The Government agents concluded that the unreported net worth increase represented currently taxable income merely because they did not find out where the money came from (R. 250-255). The Government definitely did not establish any likely source of the alleged net worth increases.

In this respect the present case differs materially from the case of *Holland* v. *United States, supra,* as well as the other three net worth cases referred to therein, also decided on the same day. In each of those cases a "likely source" of unreported income was shown.

Inasmuch as there was a failure to establish a "likely source" of the alleged unreported income, the inference that the "unexplained" net worth increases were in fact current taxable income, is far less justified in the present case than in the four net worth cases referred to above. Therefore, unless there is adequate evidence elsewhere in the record tending to support the inference that the net worth increase represented current taxable income, the alleged increases in net worth, standing alone "cannot be assumed to be attributable to currently taxable income."

This brings us, then, to inquire into the nature and extent of the examination or search which led up to the making of the net worth statements, the failure, if such there was, to explore pertinent or vital "leads" as to the source of funds used for the "unexplained" expenditures, whether petitioner's records and books of account were adequate to account for such expenditures, and whether the petitioner was placed in the position of having to assume the burden of proof in order to disprove or account for the apparent net worth increase.

2. The Government Agents Failed to Track Down an Important and Relevant Lead as to the Existence of a Substantial Asset Referred to as an Item of $114,000.

In approaching this case it may be appropriate to point out that this is not a case where there were any secret bank accounts, or safe deposit boxes, nor was there any use of fictitious names or other attempted concealments, nor were there incomplete or inaccurate books of account, or other subterfuges or devices usually employed by persons attempting to evade taxes. Moreover, the petitioner in this case unquestionably can, if he be required to assume the burden of proof, establish not only that *all* of the unreported portion of his alleged net worth increase for the year 1945 was not taxable income at all, but he can also establish the exact source thereof. He can also establish that a large portion ($39,101.69) of the alleged increase in net worth for the year 1946, was not taxable income, and that in its subsequent settlement of petitioner's civil tax liability for the year 1946, the Government conceded that the alleged unexplained net worth increase of $70,769.76 relied upon by the Government in the criminal case for the year 1946 involved herein (R. 245) was over stated by at least $39,000, leaving only $31,769.76 to be "explained" for that year. There is more than a reasonable probability that petitioner owed no additional tax whatever for the year 1945, and there is grave doubt as to his guilt with respect to the year 1946.

As stated by this Court in *Holland* v. *United States, supra,* "an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth * * * " (p. 9 of printed opinion).

In this case the Government agents failed to track down an important and relevant lead as to the existence, shortly prior to the prosecution period, of an item of $114,000 which would have completely exonerated petitioner as to the year 1945, and in a large measure as to the

year 1946.* Petitioner was thus forced by the risk of an adverse verdict to come forward with proof to substantiate this lead (R. 307). Cf. *Holland* v. *United States* at p. 13 of the printed opinion. Petitioner's proofs in an effort to assume this unexpected burden of proof were incomplete because petitioner did not have adequate time, between the receipt of the bill of particulars and the trial of the case to locate and produce the necessary witnesses. The bookkeeper who kept the accounts reflecting the exact status of this fund (and its availability as a cash asset not included in the Government's opening net worth statement) was finally located in New York but was not immediately available as a witness (see Affidavit of Austin F. McFee attached to Motion for Leave to File Supplement to Petition for Writ of Certiorari, filed November 15, 1953). Another witness who had knowledge of substantial cash on hand was located at Lincoln, Nebraska (R. 395). And other witnesses who could have established the authenticity of brokerage records indicating other assets not included in the opening net worth statement, could not be located in the limited time (R. 371 and 375 et seq.) Petitioner himself was not called as a witness to substantiate the account apparently because his trial attorney chose not to do so inasmuch as the record showed he had been convicted and fined for an O.P.A. offense (R. 108).**

The government agents were most diligent in ferreting out the fact that petitioner had paid this fine out of cash from "unexplained" sources (R. 108, 115, 139). The fine grew out of the same transaction that involved the $114,000

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* The Government agents interviewed Helen Knoerr the bookkeeper who kept the books of account covering in minute detail this $114,000 item. They also interviewed McDonald (or McDonnell), the person who actually received the initial lump sum cash payment of $109,940, which was included in the $114,000 item) from petitioner in 1943. If the Government agents did track down this item they suppressed this important evidence.

** A photostat of the account was filed with the Clerk of this Court November 15, 1953.

item. R. E. McDonald (also referred to as McDonnell—obviously a reporter's error) was the man who actually handled the $114,000 item (R. 307). He testified that $102,700 in cash came from petitioner in July 1943 (R. 307-8, R. 324). But the agents made practically no effort to track down the part of the transaction favorable to the petitioner—namely the existence of this fund or cache as an asset at the beginning of the prosecution period.

The examining agents knew about this item of $114,000 and talked to petitioner about it (R. 263). Agent Rice testified as follows (R. 287-289):

> Q. You didn't give credit for the $114,000.00 merchandise not reflected in the books of the North Idaho Sales Company that were purchased in the year 1943?
> A. I understood that was sold.
> Q. During what year?
> A. 1943.
> Q. You just understood that?
> A. Yes, sir.
> Q. You didn't give him credit for that merchandise I take it, at the end of 1943?
> A. In talking to Mr. McFee in Mr. Emasio's office relative to these items he said that would probably be accounted for on the Foresters Club books; they related to the purchase of whiskey and liquor. There was 5 to 7 loads that we had evidence of, coming from the east, in talking to him he explained that was turnover.
> Mr. Emigh: I think that is not responsive to the question.
> The Court: I think it is, it may stand.
> A. —therefore, why should I give him credit for 113 or $114,000.00 when it was turnover. He purchased one load and then he sells that and purchases another load and takes that and sells it.
> Q. Wasn't that item of $114,000.00 a single item?
> A. No, it was evidenced by purchases.
> Q. In 1943?
> A. That is right, some of it cash, most of it, in fact all of it. It was paid in the East, St. Paul and Duluth.
> Q. What did you have at the end of 1942?
> A. Investment in the North Idaho Sales Company.

Q. Were the assets of the North Idaho Sales Company augmented by $114,000.00 in 1943?
A. Not by my computation, I followed the books.
Q. They did not show this item?
A. For liquor sales, $114,000.00 for liquor sales.
Q. As expended?
A. No.
Q. $114,000.00 didn't show on the North Idaho Sales account as expended?
A. That is right, it was paid in cash.
Q. Paid in cash?
A. That is right.

There was nothing more than an indifferent attempt to track down this important item. The agent merely let it go because he said that petitioner said it was a "turnover,"* and because it didn't show on the North Idaho Sales Company records. He could easily have confirmed the actual facts from McDonald. He knew that McDonald knew about the transaction because the Government itself called McDonald as its own witness to prove the source of the payment of the fines growing out of the transaction. But because their own investigation was inconclusive they arbitrarily resolved the issue against the petitioner and deliberately excluded the item from their opening net worth statement.

The origin of this fund is of no particular moment because it was known to exist in 1943 and $86,528.59 thereof was on hand at the beginning of 1945. Suffice it to say, at this point, that a thorough investigation would have disclosed the existence of at least $75,000 thereof as a pre-1936 account receivable and the availability of $86,528.59 thereof on January 1, 1945.

In this case, as distinguished from *Holland* v. *United States, supra,* and the three other net worth cases referred

* It is extremely unlikely that petitioner actually said it was a "turnover." The account itself, a photostat of which is on file in the Clerk's Office confirms McDonald's statement (R. 324) that it was a lump sum cash transaction. It shows an opening lump sum cash payment of $109,940.

to therein decided the same day, the claim of a cache is highly probable. The photostatic copy of the account, on file in the Office of the Clerk of this Court, follows the entire transaction from its inception in 1943, shows the disposition of each item, and demonstrates that at the beginning of the prosecution period this source alone provided an available source of cash in the amount of $86,528.59. (See Affidavit of John N. Newland, C.P.A., attached to Supplement to Petition for Writ of Certiorari filed November 15, 1953).

Regardless of what may be said as to the legal availability of the record of this account at this stage of the proceeding it demonstrates beyond reasonable doubt that the opening net worth statement used by the Government in this case omitted an item of $86,528.59 in cash or equivalent which, if included, would have completely exonerated petitioner for the year 1945. There were other errors referred to in the Newland affidavit which, together with the subsequent revision (downward) of taxable income, made by the Government in its determination of the civil tax liability, would have exonerated the petitioner of criminal liability for the year 1946 also.

This may be "looking backwards." But it demonstrates that the use of the net worth method is "so fraught with danger for the innocent that the courts must scrutinize its use." And it shows also that if the Government agents had properly investigated the case, and if the burden of proof had been clearly met by the Government, and not shifted to the petitioner, the petitioner probably would not have been convicted. We respectfully submit that this is the kind of a case where the petitioner ought to have the opportunity of a new trial conducted under the guidance of the standards set forth by this Court in *Holland* v. *United States, supra.*

3. The Investigation Upon Which the Net Worth Computation Was Based Was Wholly Inadequate.

Petitioner is an older person who had been in business on a substantial scale for many years prior to 1936 in locations other than the State of Idaho.

The Government's witness, McCain, testified that he had known petitioner for 20 or 25 years and that petitioner had been a resident of the State of Washington during the later 1920's (R. 151-152). Government witness Masterson testified that he had been employed by petitioner at Spokane, Washington, for about five years which included the year 1929 (R. 199-200).

Petitioner's witness, Grosscirth, testified that between 1929 and 1932 petitioner transacted about $100,000 worth of business with him which was paid mostly in cash (R. 399-403).

Government agent Rice testified that he had heard that petitioner had been in business for some 15 or 20 years prior to 1936 *but that he did not investigate that because it "was hearsay"* (R. 281). Government agent Olsen on the other hand testified that, in arriving at petitioner's net worth he relied upon "any hearsay evidence that we could find that would establish that he might have had assets at the beginning of the year" (R. 252).

The record is completely devoid of evidence of any effort whatever to obtain, or to present any information bearing upon, petitioner's financial history prior to 1936. Such an investigation would have disclosed that such prior business operations were substantial, that they involved large sums of money and that they provided a source of at least $75,000 in accounts receivable in the nature of a return of capital, which were collected shortly prior to the prosecution period and which formed a large part of the $114,000 item for 1943 known to the Government agents but not included in the opening net worth computation.

The real investigation for the purpose of the net worth computation began with a search of records beginning with

the year 1942 and continuing forward to the year 1947 (R. 281-282). The agents searched county and court records in six locations in Northern Idaho (R. 239). But they were not looking for assets on hand. They did not attempt to ascertain whether petitioner owned various pieces of property in Shoshone County or other Northern Idaho counties (R. 281-282). They were looking only for records of sales of property (R. 282). They found no undisclosed or secret bank accounts. They found only one personal bank account concerning which there was no secrecy. But they overlooked two bank accounts, closed out shortly prior to the prosecution period, and other recorded assets, totalling $32,484.33, which (in addition to the $86,528.59 derived from the $114,000 item) were not included in the opening net worth computation (see affidavit of John N. Newland attached to Supplement to Petition for Writ of Certiorari, filed herein Nov. 15, 1953). Furthermore they made no effort to inquire as to whether petitioner had any bank accounts in Spokane (R. 281) a place of former business operations (R. 153, 200).

Agent Rice said he made no investigation of any brokerage houses, for stocks or bonds or other assets (R. 283) and the testimony of Agent Olsen (who said he had testified as to his entire search for assets) is devoid of any reference to an investigation of brokerage houses or brokerage accounts. Petitioner claimed that he had made extensive investments in stocks purchased through stock brokers in 1927 and 1928 (R. 372). There is no doubt but that petitioner had a penchant for investing in stocks—particularly mining stocks (R. 219; 140-141; 166). Even the opening net worth statement shows investment of $20,603 in mining and other stocks (Appendix p. 25, post). Proceeds of sales of stocks prior to 1945 could well have provided a substantial additional source of funds for petitioner's 1945 and 1946 expenditures.

The Government agents examined petitioner's partnership books of account for the years 1942-1947 but did not

have, nor did they examine, any of his books and records for the period 1936-1941 or prior thereto (R. 275). They did not examine any of his individual books of account at all (R. 286).* For the period 1936-1941 the agents did not have or know petitioner's annual or total gross income. The Tax returns for those years had been destroyed (R. 50). They had only petitioner's annual *net* income (R. 284) and the amounts of taxes paid. Net income obviously would not disclose the untaxed portion of capital gains, or untaxed income offset by depreciation, all of which would provide a source of funds in excess of taxable net income.

There is no doubt but that petitioner habitually kept a considerable amount of cash on hand. Ruth Poska approximated the amount as being in excess of $50,000 in 1945 (R. 395) and testified that she had so informed the investigating agents when questioned on the point (R. 395).

Nevertheless, in making up their opening net worth statement for the prosecution period petitioner was given no credit whatever for any cash on hand (see App. p. 25, post). The Government agent testified that they made their net worth computation from such information as they had available (R. 285). But it must be evident that they were highly selective and apparently chose to ignore considerable information favorable to the taxpayer.

In an effort to establish a firm starting point for the opening net worth computation the Government produced evidence (1) that petitioner was employed in the meat department of a grocery store for 8 or 10 months in 1935 at $50 or $60 a week with a 25% bonus on any earnings (R. 152), (2) that pteitioner made an initial investment of less than $2,000 in the North Idaho Sales Company in 1936 (R. 190), and (3) that in 1936 he lived frugally with an employee in a cinder-block building owned by petitioner, that they did their own cooking and that petitioner at

* Helen Knoerr who kept these accounts showing the $114,000 item was not in petitioner's employ when the investigation was made. These accounts were merely piled in an old storeroom together with other old records.

times did not have enough money in bank to honor the checks issued to his employee for wages (R 203). But the record did not show that petitioner was then sending his daughter to college.

From 1936 to 1942 the record is silent as to petitioner's financial affairs except as to his annual taxable net income, and his capital account and other assets shown on the books of the North Idaho Sales Company *beginning with 1942.*

The poor financial condition, or rather poor cash position, of petitioner in 1936 was, of course, a circumstance tending to show the lack of available cash funds in 1936. But that period was relatively remote. It was 9 years prior to the prosecution period. There was no proof, with respect to the intervening period, that petitioner was in dire financial straits or that he was not in possession of substantial assets prior to the prosecution period. On the contrary the Government agent Olsen testified that according to his figures petitioner's net worth at the beginning of the prosecution period was $185,325.50 (R. 246). And he admitted that this did not include the item of $114,000, known to exist in 1943 (R. 263, R. 288). Somewhere, in between 1936 and January 1, 1945 petitioner accumulated a total of net assets in excess of at least $290,000 ($185,300 plus $109,940 which latter figure is the exact amount of the original lump sum cash payment in 1943 as shown by the transcript of account filed herein on November 15, 1953, which amount is included in the $114,000 figure referred to by the Government agent Rice (R. 307)).

It is just as logical to infer (if we must infer guilt from the possession of assets which an investigating revenue agent is unable to account for) that this figure of $109,940 constituted unreported income for the year 1943, or for some prior years, as it is to assume that petitioner did not have a substantial portion thereof at the beginning of 1945, and hence to infer petitioner's guilt for 1945.

In *Holland* v. *United States, supra,* the evidence relied upon by the Government to corroborate the non-existence

of prior assets completely accounted for an area of several states and thoroughly went back over a score of years prior to the prosecution period, thus effectively refuting the existence of a cache. In the present case, on the other hand, although petitioner had been in business for many years prior to 1936 in several states, the investigation did not cover any of petitioner's activities prior to 1936. Furthermore there is a hiatus between 1936 and 1942, and the search beginning with 1942 included only six locations in Idaho, and that search was directed to *sales* and not to assets of record (R. 282). Moreover in *Holland* v. *United States, supra,* a probable and available source of unreported current income was shown, whereas, in the present case a probable source of current unreported income was not shown.

In *Friedberg* v. *United States* (No. 18) also decided December 6, 1954, by this Court, the taxpayer's finances were traced from as far back as the year 1922, and the evidence pointed unmistakably to the conclusion that there was no hoard of cash at the beginning of the prosecution period.

In *Smith* v. *United States* (No. 52) also decided by this Court on December 6, 1954, the evidence showed no tax returns filed for 1936 through 1939, non-taxable or non-assessable returns were filed for the years 1940 through 1944, with a taxable return for the year 1941; also that from 1941-1945 the taxpayer worked for $40 a week and that his wife worked also. Such evidence covered the period immediately prior to the prosecution period and strongly negatived the existence of a cache available for the mink coat, brokerage accounts, 9 new bank accounts and other assets acquired during the prosecution period.

In *United States* v. *Calderon* (No. 25) also decided by this Court on December 6, 1954, there was not sufficient evidence of the taxpayer's prior financial history to substantiate the net worth statement used therein. But the Court pointed out that the taxpayer himself testified that his cash on hand at the beginning was not sufficient to

account for his net worth increase even for the first year of the prosecution period.

In all of the above cases, the existence of a pre-prosecution period fund or source adequate to account for the alleged net worth increase was negatived by the evidence adduced in the case. In the present case the evidence not only indicated the strong probability of such a fund, but the exact amount thereof is shown by the account on file in the office of the Clerk of this Court, and by the affidavit of John N. Newland attached to the Motion for leave to file Supplement to Petition for Writ of Certiorari filed November 15, 1953, herein.

Such fund was adequate to completely exonerate petitioner for the year 1945. The alleged net income for 1945 based on the alleged net worth increase was $105,077.90 (R. 243). Petitioner reported a net income of $25,166.67 (R. 243) leaving a balance of $79,911.23 alleged to be unreported. Petitioner had on hand $86,528.59 or $6,617.37 more than necessary to account for the entire alleged net worth increase for 1945.

As for 1946, the alleged unreported income was $70,769.76 (R. 245). As shown by the Newland affidavit referred to above the Government agents understated physical assets on hand to the extent of at least $32,484.33 in addition to the $86,528.59 available from the $114,000 item. Thus the net worth statement for 1946 is in error to the extent of at least $39,101.99 ($6,617.37 plus $32,484.33). In addition to the above, the Government conceded an error of $39,000 in income in its determination of civil tax liability for the year 1946. Thus there is a reasonable probability that petitioner actually owed no additional tax whatever (in excess of that paid on the $39,679.01 of income reported in his 1946 return).

4. Petitioner's Books of Account Were Complete and Accurate, and Accounted for All of His Alleged Net Worth Increase for 1945 and for All of His Probable Net Worth Increase for 1946.

Petitioner's books of account were kept by employees. All cash receipts were received by employees and recorded either on the cash registers, in the case of the taverns (R. 301, 325, 361) or in the collection books in the case of the coin operated machines. Location owners where the coin operated machines were located received one-half of the proceeds, signed a receipt and received a duplicate copy. All cash was balanced daily with the collection books (or cash registers) by employees, and deposited in bank by employees. (R. 205-209; 297; 327; 335; 347; 357; 360; 367) These record were again balanced monthly by employees and were sent monthly to an independent accountant who audited the accounts, checked them against bank deposits, and maintained a ledger reflecting the entire operation. (R. 80). The examining agents did not have the books for the period 1936-1941 (R. 275) but presumably the books beginning with the year 1942 carried over, accurately, the account balances existing at the end of 1941, although they would not reflect distributions made to petitioner prior to 1942. At any rate the Government agents accepted them as being correct in reflecting amounts available to petitioner from that source from and after the beginning of 1942 (R. 288).

In addition to petitioner's business books of account petitioner kept a personal account of that portion of his cash on hand and the disposition thereof, which was included in the $114,000 item referred to above and which is shown in the 73 page account filed November 15, 1953 with the Clerk of this Court. This was not an income account. All earnings from the assets reflected in this account, were duly recorded and reported in his business books of account (R. 370). And as stated by the Government witness Olsen there is no requirement in the case of individuals (as distinguished from corporations) that the taxpayer

maintain, or show in his return, any financial statement of assets, other than taxable receipts and disbursements (R. 254).

There is no evidence in this case that petitioner's books of account were not full and complete and accurate—except the inference that might be drawn from the alleged net worth increases, and the testimony of the examining agent that he was unable to find out where the "unexplained" increases came from (R. 242). But that inference is negatived by the agent's admission that the "unexplained" increases might have come from prior cash on hand (R. 253) and by the wholly inadequate investigation of petitioner's past financial history, and of the $114,000 item.

So we have, in this case, a situation where books of account which appear correct on their face are, by inference based upon a net worth statement, assumed to be incomplete or incorrect. Then a further inference is tacked onto the first inference namely, that since the source of the "unexplained" increase is unknown, and even though no probable source thereof is shown, the amount is assumed to be taxable income.

Then there is a third inference based on the other two, namely, that since the books of account were inferred to be incorrect, and inasmuch as the "unexplained" and unreported increase was inferred to be income, the petitioner's failure to report such amount was willful, and therefore he was guilty.

It is respectfully submitted that such multiple inferences are not justified in this case; and that the circumstances surrounding the alleged net worth increase are as consistent with innocence as with willful violation, and that there is here a strong probability of a miscarriage of justice because of the use of the net worth method, without regard to the proper safeguards referred to by this Court in *Holland* v. *United States, supra.*

5. Petitioner Was Called Upon Not Only to Explain the Alleged Bulge in His Net Worth, But Also to Demonstrate That He Had Received No Unreported Income From the Suspected Source.

As has been pointed out above the Government's case was premised upon an alleged "bulge" in net worth from admittedly unknown sources (R. 242), without proof of the receipt, or of the opportunity of receipt, of any unreported income from any known source. It is quite clear however, from the testimony of the government witness Masterson (R. 199), and from the cross examination of petitioner's witnesses, and from the Court's charge to the jury, that the government's theory of the case was that petitioner had somehow obtained the unexplained funds from current collections made from the coin operated machines (R. 408, 397, 352, 384, 330, 338-344, 346, 351-352, 353). But there was no evidence tending to support such a theory. Government witness, Masterson, one of the collectors, testified that petitioner did not get any of the collections from any location (R. 208-210). The evidence, which petitioner was forced to produce following the denial of his motion for judgment of acquittal at the close of the government's case (R. 28) affirmatively shows that petitioner had no access whatever to that source. The machines were locked and petitioner did not have a key; petitioner made no collections himself; all collections were made by an employee in the presence of the owner of the location; the owner of the location received one-half of the collection; and received a copy of the collection slip which was made out in triplicate; and the amount of the collection was checked and rechecked, deposited in bank, reconciled and balanced with the collection slips and recorded on the books of account (R. 296, 297, 303, 327, 328, 335, 336, 348, 350, 355-357, 358, 361, 367, 398). All this was done by employees. The collection slips were contained in triplicate in books. The collector kept one copy, the

location owner received one copy and the third copy was kept for bookkeeping purposes and for checking against the cash, or against the bank deposit slips turned in by the collector (R. 205).

The truth of the matter probably is that the government suspected that petitioner in some unknown manner had connived with some of the location owners to split a portion of the coin box receipts prior to recordation (R. 344). That, undoubtedly, accounts for the continued effort, on cross examination by the Government, to find out exact locations of these machines so they could interrogate the location owners. But there is not a word of evidence direct or indirect, upon which such an inference could possibly be predicated.

The trial Court, however, caught the spirit of the thing and concluded that if the petitioner had produced all of the collection books or slips used during the two year prosecution period, and had totalled them all up and had checked them against the books, that would have established that petitioner's witnesses had told the truth and would have exonerated the defendant. So he commented to the jury as follows (R. 417):

> "I don't want to comment on the evidence but there is one outstanding matter that you are left in the dark about, I don't intend to make any inference about it, as the evidence here is solely for you. But where are the tickets that should show the receipts and division of the money taken from the slot machines for the years 1945 and 1946. There was only one of these books of tickets introduced in evidence by the defense. None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with the bank account that it would have been an easy matter for the defense to produce the tickets if they had not been destroyed. Why were

they not produced to show the receipts of the slot machines for these years?

"The burden of proof resting upon the Government does not shift during the case but when in the trial of charges of income tax evasion discrepancies between the taxpayer's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in finding your verdict."

This comment was objected to (R. 424); and the Court then told the jury not to be influenced by the Court's remarks as to what the Court thought about petitioner's failure to produce the collection slips, but still left the jury with the thought that this was a very important point for their consideration (R. 424).

The effect of the Court's remarks was to shift to the petitioner the burden of establishing beyond a reasonable doubt that the coin box collections were not even a possible source of the alleged net worth "bulge." This was particularly onerous because the likelihood or even the possibility of such a source, had not been established by the government by any evidence of any kind direct or indirect. Petitioner was called upon to conclusively rebut a mere suspicion.

Moreover the collection slips, or books were mere temporary records, of a type which normally would not be preserved by petitioner or by any other business concern over a period of years. These records were voluminous. Three or four books were used by one collector each week and there were several collectors—as many as eight (R. 204). They had been checked, and double checked and entered and balanced in the permanent books of account (R. 398). It is not common business practice to preserve such preliminary or temporary records.

Furthermore since these temporary records were currently turned over to petitioner, the court's charge in

effect required the petitioner, himself, to take the witness stand to account for these records or at his peril to submit to an adverse inference by the jury.

The danger of requiring the taxpayer to assume such a burden of proof was specifically referred to in *Holland* v. *United States, supra,* whereas the lawful burden of proof to establish every element of the offense was on the government (see pages 5 and 16 of printed opinion in *Holland* v. *United States, supra*).

We submit that it was not incumbent upon petitioner to rebut a mere suspicion, and that the comment of the Court was unwarranted and highly prejudicial.

CONCLUSION

As pointed out by this Court in *Holland* v. *United States, supra,* the use of the net worth method "is so fraught with danger for the innocent that the courts must closely scrutinize its use." In the present case, as distinguished from *Holland* v. *United States, supra,* (a) the Government did not establish a likely source of the alleged net worth increase; (b) the Government agents failed to track down an important and relevant lead as to the existence of a substantial asset referred to as an item of $114,000; (c) the investigation upon which the opening net worth computation was based was wholly inadequate, not only as to the period immediately preceding the prosecution period, but also as to petitioner's financial history prior to 1936; (d) petitioner's books of account were complete and accurate and accounted for his entire alleged net increase for the year 1945 and accounted for the amount of net increase subsequently determined in his civil tax liability for 1946; and (e) petitioner was called upon to assume the burden of proof to refute, beyond a reasonable doubt, the suspected, but not proved, source of alleged unreported income.

We submit that these things are the kind referred to in *Holland* v. *United States,* that the courts should guard against, and that this is the kind of case where the petitioner ought to have the opportunity of a new trial conducted under the guidance of the standards set forth by this Court in *Holland* v. *United States, supra.*

Wherefore petitioner prays that his Petition for Writ of Certiorari be granted.

ELDEN MCFARLAND
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Washington 5, D. C.
Counsel for Petitioner

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A F McFee

YEAR 1945

Net Worth Statements - Showing the Changes during the Year 1945 in the Properties Owned.

Assets	Assets on hand as of Jan 1st 1945	Assets on hand as of Dec 31st 1945	Changes during Year Increase	(Net) (Decrease)
Checking Account - Special Account - First National Bank - Wallace	160172	591219	431047	None
Stocks Owned - Mining and other	2060360	2720360	660000	None
Real Estate - Rental Property	3235000	4145000	910000	None
Government Bonds	697500	1697500	1000000	None
Loans Receivable	250000	4611306	4361306	None
Cashiers Checks	2290000	2290000	None	None
Dan Murphy Lease - Total Net Investment	1723429	2898195	1174766	None
Dan Mac Lease - Investment Account	None	164749	164749	None
Foresters Club - Coeur d'Alene - Investment Account	1883899	252232	None	(1631667)
Foresters Club - Coeur d'Alene Contract	None	1000000	1000000	None
Foresters Club - Lewiston - Investment Account	945416	2095052	1149636	None
Gem Club - Athol - Investment Account	968893	377733	None	(591160)
Miscellaneous Receivable	112667	306171	193504	None
Cash from Checks - Foresters Club - Lewiston Drawing	None	1500000	1500000	None
Cash from Sandusk Repayment of Loan	None	100000	100000	None
North Idaho Sales Company - Investment Account	5969377	6266103	296726	None
Total Assets	20296713	31015620	12941734	(2222827)
Liabilities and Reserves:				
Notes Payable Idaho First National Bank - Not On Book of North Idaho Sales Co	1670000	1661087	None	(8913)
Reserve for Depreciation - Rental Property Allowed on Returns	94163	241013	146850	None
Total Liabilities and Reserves	1764163	1902100	146850	(8913)
Total Net Worth	18532550	29113520	12794884	(2213914)
Changes during Year Net Increase			12794884	
Changes during Year Net Decrease			(2213914)	
Increase in Net Worth during the Year 1945				10580970

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Year 1946

A F McFee
Net Worth Statements – Showing the Changes During the Year 1946 in the Property

Assets	Assets on Hand As of Jan 1st 1946	Assets on Hand as of Dec 31st 1946	Changes During Year Increase	Changes During Year (Net) (Decrease)
Checking Account - Special Account - First National Bank - Wallace	4912.19	2772.40	None	(2139.79)
Stocks Owned – Mining and Other	270360	425560	155200	None
REAL Estate – Rental Property	415000	415000	None	None
Government Bonds	1697500	1697500	None	None
Loans Receivable	421306	510306	490000	None
Cashiers Checks	2290000	2390000	1100000	None
Dan Murphy Lease – Total Net Investment	2831795	1615577	None	(1232618)
Dan Mac Lease - Investment Account	169779	(165166)	None	(329915)
Foresters Club - Coeur d Alene - Investment Account	252232	252232	None	None
Foresters Club - Coeur d Alene - Contract	1000000	1000000	None	None
Elem Club - Athol Investment	377133	377133	None	None
Samuels Hotel - Investment	None	2728322	2728322	None
Miscellaneous Receivables	306171	None	None	(306171)
Cash From Check - Foresters Club - Lewiston	150000	None	None	(150000)
Cash From Sandack Repayment	100000	None	None	(100000)
Foresters Club Lewiston - Investment	2075032	3432235	1337178	None
North Idaho Sales Co. Investment Account	626603	1863474	1236871	None
Total Assets	3101562	3827519	11584576	(3731619)
Less				
Liabilities & Reserves				
Notes Payable – Idaho First National Bank Not Shown on Books / North Idaho Sales	461087	107719	None	(563768)
Reserve for Depreciation - Rental Property Allowed on Returns	241063	421513	180500	
Total Liabilities & Reserves	1702150	1512382	180500	(563768)
total Net Worth	2911350	3738681	11378076	(3167915)
Changes During year – Net Increases			11378076	
Changes During year - Net Decreases			(3167915)	
Increase in Net Worth During the year 1945				8210161

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 414

AUSTIN F. McFEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 444-456) is reported at 206 F. 2d 872.

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1953. (R. 457.) On September 17, 1953, by order of Mr. Justice Clark, the time for filing a petition for a writ of certiorari was extended to October 23, 1953. The petition was filed on October 15, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See

also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether, where the Government's proof of wilful tax evasion is circumstantial, a court is required to give the jury a specific instruction to acquit the defendant if the proof is not such as to exclude every reasonable hypothesis except that of guilt, over and above the usual instruction on the presumption of innocence and on reasonable doubt.

2. Whether it was error for the trial court to comment, during its instruction to the jury, on the fact that certain primary records were not produced by the defense to contradict the Government's prima facie case.

STATUTES AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. *Penalties.*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction

thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 145.)

Criminal Code:

SEC. 3481. *Competency of Accused.*

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.
(18 U.S.C. 3481.)

Federal Rules of Criminal Procedure:

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission

therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On November 8, 1951, a two-count indictment was filed against petitioner in the United States District Court for the District of Idaho charging him with violations of Section 145(b) of the Internal Revenue Code. The first count alleged that petitioner filed a false income tax return for the year 1945 in which he stated that his net income was $25,166.67 on which the tax was $10,021.05, whereas he knew that his income was $105,077.90 and that the tax was $71,076.35. The second count alleged a false return for the year 1946 in which petitioner claimed a net income of $39,679.01 and a tax of $18,091.35, whereas the figures should have been $113,748.77 and $74,881.45. (R. 3-4.) After a jury trial petitioner was found guilty as charged, and on May 1, 1952, he was sentenced to eighteen months' imprisonment and a fine of $7,500 on each count. The terms of imprisonment were consecutive, but the second term was suspended and he was placed on probation for two years to follow the term of imprisonment on condition that he pay all income taxes due. (R. 32-33.)

The Evidence.—During the years involved, petitioner derived a major portion of his income from the North Idaho Sales Company, which owned and serviced numerous coin-operated slot machines

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over a wide territory in Idaho.[1] (R. 64-66, 72, 206-207, 295, 298, 334, 338, 347-348, 351-353, 392.) The amounts collected from these machines by petitioner's route men were recorded on receipts of which two carbon copies were made. One of the carbons was left with the owner of the location at which the machine was being operated; the original receipt, the other carbon, and the money collected were turned in to a girl employee in the office of the North Idaho Sales Company. The girl checked the cash against the receipts and deposited the cash in the bank. She then turned the receipts and carbons over to petitioner and did not see them thereafter.[2] (R. 204-209, 296-298, 334-336, 347-349, 355-359, 360-366, 397-399.) The extent of the slot machine business is apparent from the following tabulation of gross income derived from that source as shown on the books of the Sales Company (R. 384):

1942	$169,307.89
1943	173,144.48
1944	140,405.95
1945	191,446.83
1946	246,469.77

Petitioner reported all the income actually recorded in the books of the North Idaho Sales Com-

---

[1] He also had income from several taverns, and from rents, dividends and interest. (R. 62-74.) The North Idaho Sales Company, originally a partnership between petitioner and his daughter, was a sole proprietorship during the years involved in this case. (R. 189-190, 254.)

[2] The petition erroneously states (Pet. 8) that only the "third triplicate copy" was turned over to petitioner. (R. 358, 366, 399.)

pany. (R. 70, 76, 167-168.) However, the accountant who prepared the returns did not audit the books, and he did not examine the receipts of the route men. (R. 77-80.) When internal revenue agents began an investigation of the returns for 1945 and 1946, they discovered that petitioner had spent considerably more than his reported income during those years. He told the agents that the source of these expenditures was a cash fund of $50,000 which he had at the close of 1941, and he promised to produce records and a witness. He produced neither; and the witness, when interviewed by the agents, had no information to give. (R. 237-240, 259-272.) The slot machine receipts, although requested, were never furnished to the agents. (R. 260, 399.)

Under the circumstances the Government used the expenditures method to compute petitioner's true net income for 1945 and 1946. It was shown that he had expended large sums, in investments, in loans, in attorneys' fees, and in payment of a Federal District Court fine, which far exceeded his known resources plus his reported income. (R. 218-241.) The computation revealed that for the year 1945 he had a net taxable income of $105,077.90 of which he had reported only $25,166.67, and that for the year 1946 he had a net income of $110,448.77 and reported only $39,679.01. (R. 241-245.) This result was corroborated by a net worth computation. (R. 245-249.)

In order to prove that these 1945-1946 expenditures must have been made from current income,

and could not have come from some cash fund accumulated during prior years, the Government showed that during 1934 and 1935 petitioner was employed as a butcher and lived very economically (R. 150-154, 200-203); that his interest in the slot machine business was very small at that time (R. 200-203); and that, on the basis of the income reported in his returns and his known expenditures for the period from 1936 through 1944, he could not have accumulated much more than $20,000 (R. 188-197, 217-218, 273-279). A thorough examination was made to determine all possible assets and sources of income. (R. 237-240, 259-272.) Even if he had, as he claimed, $50,000 in cash at the end of 1941, that sum would have been exhausted by his expenditures during 1943 and 1944 (R. 256), and he would have needed $150,000 in cash at the end of 1944 to account for all the unexplained expenditures during 1945 and 1946 (R. 257).

Petitioner himself did not take the stand. Some of his witnesses testified that he kept indefinite amounts of cash in safes, which amounts were not recorded in the books. (R. 302-306, 332-333, 394-397.) Another witness testified that petitioner had assets worth over $100,000 in 1943 which the Government had not taken into consideration in its computation.[3] (R. 307-325.) The receipts made out by the slot machine route men were not introduced in evidence.

The Instructions.—Apparently no written re-

[3] The Court of Appeals described the testimony of this witness as "contradictory and highly questionable". (R. 450.)

quest for a specific instruction on the nature of circumstantial evidence was filed at the close of the evidence.[4]

In his charge to the jury (R. 412-426) the trial judge gave the usual instruction that the Government had the burden of proving petitioner guilty beyond a reasonable doubt (R. 415-416). He explained briefly the Government's expenditure and net worth methods of proof (R. 420-421) and said (R. 420)—

> This is in the nature of circumstantial evidence. Therefore, you should consider whether or not the Government has precluded every reasonable source of these funds except earnings for the years charged. However, the Government is not required to refute all possible speculation * * *.

Then, after briefly defining the two types of evidence, he said (R. 421)—

> Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.

The trial judge also warned the jury during the course of the charge that they should not be influenced by any comment he might have made as to the facts. (R. 425.) A little later, he instructed them that, while the burden of proof never shifted from the Government, they might consider the fail-

[4] Those written requests which actually *were* filed by the defense (R. 38) have not been included in the record.

ure of petitioner to offer any explanation of discrepancies indicated by the Government's proof. (R. 417-418.) During this discussion he called attention to the slot machine receipts and said (R. 417)—

> None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with the bank account that it would have been an easy matter for the defense to produce the tickets if they have not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?

Just prior to the conclusion of the charge the jury were told that petitioner was not required to prove his innocence, that he was not required to take the stand himself, and that his failure to testify raised no adverse presumption. (R. 422.)

The defense objected to the court's failure to give "the requested instruction that not only must the evidence prove guilt but that it must prove the hypothesis of guilt to the exclusion of all other hypotheses". (R. 424.)

The defense also objected to the court's "comment as to * * * the failure of the defendant to retain the sales slips, or collection slips". The judge recalled the jury and specifically instructed them that they should not be influenced by this comment. (R. 424.)

After the jury had been deliberating for about eight hours, they returned to the courtroom at 8:30 p.m. and the foreman informed the court that they had not yet been able to agree on a verdict. The court asked whether they had any questions and the foreman replied that they would like to hear again the instruction on circumstantial evidence. The court then reread that portion of his original charge in which he had defined the two types of evidence and explained the weight to be given circumstantial evidence. (R. 425-426.) There was no objection.

The record does not reveal how much longer the jury deliberated before it returned with its verdict.

ARGUMENT

1. The evidence that petitioner wilfully evaded payment of his income taxes was circumstantial. The trial court instructed the jury on the presumption of innocence, reasonable doubt, and the general nature of circumstantial evidence, but refused to add a formula to the effect that, for circumstantial evidence to be sufficient to sustain a verdict of guilty, it must be such as to exclude every hypothesis other than that of guilt. Petitioner contends (Pet. 10-13) that the Courts of Appeals in some circuits hold that such an instruction is required.

In the first place, the original charge actually contained the substance of the desired instruction in language closely keyed to the facts of the present case. While explaining to the jury the Govern-

ment's use of the expenditure and net worth methods to prove unreported income, the one critical issue in the case, the court said (R. 420):

> This is in the nature of circumstantial evidence. Therefore, you should consider *whether or not the Government has precluded every reasonable source* of these funds except earnings for the years charged. However, the Government is not required to refute all possible speculation * * *. [Emphasis supplied.]

The Court of Appeals correctly said (R. 454) that the instruction given stated the law "with much more clarity and force" than the abstract objection made by petitioner at the close of the charge (*supra*, p. 9).

Furthermore, there is no present conflict of decisions calling for a review by this Court. Many of the cases cited in the petition are not in point, for they deal, not with instructions to the jury, but with the quantum of circumstantial evidence required to take the case to the jury or to sustain the verdict.[5] Obviously, the various formulae used by appellate courts in defining and redefining this concept need not necessarily be used in instructing the jury. In pointing out this distinction, the

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[5] In this class are *Bryan* v. *United States*, 175 F. 2d 223, 226 (C.A. 5th); *Strickland* v. *United States*, 155 F. 2d 167, 168 (C.A. 5th); *Thompson* v. *United States*, 145 F. 2d 826 (C.A. 5th), certiorari denied, 324 U.S. 861; *Epstein* v. *United States*, 174 F. 2d 754, 769 (C.A. 6th); *United States* v. *Fenwick*, 177 F. 2d 488, 490 (C.A. 7th); cf. *United States* v. *Dolasco*, 184 F. 2d 746, 748 (C.A. 3d).

Court of Appeals for the Ninth Circuit said in another recent case (*McCoy* v. *United States*, 169 F. 2d 776, 786, certiorari denied, 335 U. S. 898):

> Of course, the jury's conclusion must have support in the evidence to the effect that there is no hypothesis determinable from the proof under which the verdict of guilt could reasonably be avoided, but this is not saying that any technical form of instruction need be given.

A different formula from that requested by petitioner, namely, that the jury should acquit if the circumstances are as consistent with innocence as with guilt, has been discussed in several cases. In the old case of *Garst* v. *United States*, 180 Fed. 339, 343, never since cited with approval, the Fourth Circuit held that such an instruction should be given. A dictum to the same effect in *Gurera* v. *United States*, 40 F. 2d 338, 340 (C.A. 8th), has likewise never been cited with approval. In *McLendon* v. *United States*, 13 F. 2d 777, 779, the Sixth Circuit held that the usual instruction on the presumption of innocence and reasonable doubt was sufficient, although it was better practice to tell the jury that they should acquit the defendant if the circumstances were as consistent with innocence as with guilt and did not exclude every other reasonable hypothesis but that of guilt.[6]

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[6] The court relied on *Hendrey* v. *United States*, 233 Fed. 5, 18 (C.A. 6th), which in turn relied on *Harrison* v. *United States*, 200 Fed. 662, 664 (C.A. 6th), a case involving the sufficiency of the evidence.

The only cases which we have been able to find which clearly require a specific instruction that circumstantial evidence must be such as to preclude every other reasonable hypothesis except that of guilt are two old cases in the Fifth Circuit. These are *Anderson* v. *United States*, 30 F. 2d 485, and *Stutz* v. *United States*, 47 F. 2d 1029. Neither has ever been cited with approval.

All recent federal authority clearly holds that it suffices in all cases to charge the jury on the presumption of innocence and reasonable doubt, and that it is simply confusing to indicate that some different degree of proof is required in a case in which the evidence of guilt is wholly circumstantial.[7] Judge Learned Hand first called attention to this in *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 234 (C.A. 2), certiorari denied, 279 U.S. 863, and a few years later the same jurist criticized the *Garst*, *Anderson* and *Stutz* cases in the following language (*United States* v. *Becker*, 62 F. 2d 1007, 1010 (C.A. 2d)):

> The requirement seems to us a refinement which only serves to confuse laymen into supposing that they should use circumstantial evidence otherwise than testimonial. All conclusions have implicit major premises drawn from common knowledge; the truth of testimony depends as much upon these, as do inferences from events. A jury tests a witness's

[7] For the confusion in state court decisions see Randall, *Instructions to Juries*, Sections 226-235, 1983; Branson, *Instructions to Juries* (3rd ed., 1936), Sections 65-66, 3327; Note, 89 A.L.R. 1379.

> credibility by using their experience in the past as to similar utterances of persons in a like position. That is precisely the same mental process as when they infer from an object what has been its past history, or from an event what must have preceded it. All that can be asked is that the importance of the result to the accused shall demand a corresponding certainty of his guilt; and this is commonly and adequately covered by telling them that the conclusion shall be free from fair doubt. To elaborate this into an inexorable ritual, or to articulate it for different situations, is more likely to impede, than to promote, their inquiry.

So far as we have been able to determine all recent federal decisions have followed this view.[8] See *Corbett* v. *United States*, 89 F. 2d 124, 128 (C.A. 8th); *Stryker* v. *United States*, 95 F. 2d 601, 604 (C.A. 10th); *United States* v. *Valenti*, 134 F. 2d 362, 364 (C.A. 2d), certiorari denied, 319 U.S. 761; *United States* v. *Spagnuolo*, 168 F. 2d 768, 770 (C.A. 2d), certiorari denied, 335 U.S. 824; *McCoy* v. *United States*, 169 F. 2d 776, 784-786 (C.A. 9th), certiorari denied, 335 U. S. 898; *Samuel* v. *United States*, 169 F. 2d 787, 791 (C.A. 9th); *Himmelfarb* v. *United States*, 175 F. 2d 924, 942 (C.A. 9th), certiorari denied, 338 U.S. 860; *United States* v. *Kemble*, 197 F. 2d 316, 320 (C.A. 3d); cf. *United*

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[8] The *Banks* case, cited by petitioner, is not to the contrary. The court simply said that the defendant was given the instruction he had requested. *Banks* v. *United States*, 204 F. 2d 666, 672-673 (C.A. 8th), certiorari denied October 19, 1953.

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States v. *Dolasco,* 184 F. 2d 746, 748 (C.A. 3d); *United States* v. *Augustine,* 189 F. 2d 587, 591 (C.A. 3d). Eminent text writers have offered the same criticism of the specific instruction desired by petitioner. See I and IX Wigmore, *Evidence* (3rd ed., 1940), Secs. 25-26, 2497; II Wharton, *Criminal Evidence* (11th ed., 1935), Sec. 926. And the Fifth Circuit itself tacitly abandoned its earlier holding and quoted from the *Austin-Bagley Corp.* case with approval in *Beckman* v. *United States,* 96 F. 2d 15.

In addition, petitioner apparently did not file a written request for such an instruction at the close of the evidence as required by the provisions of Rule 30 (*supra,* p. 3). The record does not contain the requested instructions, and the petition does not state that a written request was submitted on this point. The charge was, therefore, not "appropriately invoked". *Bruno* v. *United States,* 308 U.S. 287, 293; *Goldsby* v. *United States,* 160 U.S. 70, 77; *Schuermann* v. *United States,* 174 F. 2d 397, 400-402 (C.A. 8th), certiorari denied, 338 U.S. 831.

Petitioner complains (Pet. 14-16) that the supplemental instruction on circumstantial evidence, given at the jury's request after they had been deliberating for some time, likewise failed to include the formula he desired, and, in addition, made no mention of reasonable doubt. But petitioner did not, as required by Rule 30, call the trial court's attention to any supposed deficiency in the supple-

mental instruction. As has been shown, it was unnecessary to include his specific formula. The jury had been carefully instructed on reasonable doubt during the course of the original charge, and if petitioner felt that the effect of this was weakened by the supplemental charge he could easily have obtained clarification. We think, however, there was clearly nothing in the supplemental charge to indicate to the jury that they could convict petitioner if they had a reasonable doubt of his guilt.[9]

2. Petitioner contends (Pet. 16-18) that the trial court's comment to the jury on the failure of the defense to produce the receipts of the slot machine route men was, in effect, an instruction that it was incumbent on him to take the stand and produce the slips. This contention also is plainly without merit.

The prosecution had presented a clear prima facie case that petitioner had unreported income from some source during the years in question, and it had shown that the original records of the route men had not been made available to the agents during their investigation despite the fact that they had been requested. Production of the slips might have negated the slot machine business as the source of the unreported income, yet several of petitioner's route men and office girls testified in his behalf without producing them. The trial judge pointed out this patent fact. He also twice cau-

[9] There is nothing in the record to indicate whether the jury returned with their verdict shortly after receiving the charge or deliberated far into the night.

tioned the jury that they were not bound by his comments on the evidence; he instructed them that the burden of proof rested with the Government and never shifted to petitioner; and he specifically warned them that petitioner's failure to take the stand raised no adverse presumption. (*Supra*, pp. 8-9.)

The comment on the slot machine receipts was justified by the facts. The right of a federal trial judge to comment on the evidence is unquestioned,[10] and he may point out the failure of a taxpayer to offer any explanation for discrepancies between his returns and his actual income as indicated by the Government's proof.[11] "[The judge] is free, not only to give his impressions of the witnesses, but to point out the rational implications of the evidence, * * *." *United States* v. *Frankel*, 65 F. 2d 285, 288 (C.A. 2d), certiorari denied, 290 U.S. 682. Certainly, if a jury may weigh the failure of an accused murderer to explain recent possession of property of the deceased,[12] if it may draw an inference of guilt from the unexplained possession of contraband narcotics,[13] there was no error in the present instruction. Though a jury may not consider the failure of a defendant to take the stand,

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[10] *Quercia* v. *United States*, 289 U. S. 466, 469; *Glasser* v. *United States*, 315 U. S. 60, 82.

[11] Cf. *Bell* v. *United States*, 185 F. 2d 302, 309 (C.A. 4th), certiorari denied, 340 U. S. 930.

[12] *Wilson* v. *United States*, 162 U. S. 613, 619.

[13] *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Dear Check Quong* v. *United States*, 160 F. 2d 251, 252-253 (C.A.D.C.); cf. *United States* v. *Fleischman*, 339 U. S. 349, 360-364; *Rossi* v. *United States*, 289 U. S. 89, 91-92.

it may consider the failure of the defense to counter the strength of the Government's case. "If the accused happens to be the only repository of the facts necessary to negative the presumption arising from [the Government's case], that is a misfortune * * * which is inherent in the case." *Yee Hem* v. *United States, supra,* 268 U.S. 178, 185.

The decision of the Court of Appeals is not in conflict with *Wilson* v. *United States,* 149 U.S. 60, or *Bruno* v. *United States,* 308 U.S. 287. In those cases the reference was specifically to the failure of the defendant to take the stand, not to the failure of the defense.

CONCLUSION

The decision of the Court of Appeals is clearly correct and no conflict of decisions exists. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
DAVID L. LUCE,
JOSEPH M. HOWARD,
Special Assistants to the Attorney General.

NOVEMBER, 1953

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IN THE

Supreme Court of the United States

October Term, 1953

No. ~~414~~ 15

AUSTIN MCFEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

ELDEN MCFARLAND
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 414

AUSTIN MCFEE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The petitioner, Austin F. McFee, moves for leave to file the attached Supplement to Petition for Writ of Certiorari, and in support thereof states:

The judgment of the United States Court of Appeals for the Ninth Circuit was entered August 24, 1953. Petitioner's motion for an extension of time to file his petition for Writ of Certiorari to October 23, 1953, was filed September 16, 1953 and was granted September 17, 1953. The petition was filed October 15, 1953. The facts disclosed by the attached Supplement to Petition for Writ of Certiorari were not known to, or learned by, petitioner's undersigned counsel until October 29, 1953. If these facts are true, the peti-

tioner was wrongfully convicted on the first count, and there is grave doubt as to his guilt on the second count.

The petitioner was convicted by a jury on two counts of an indictment for wilful attempts to defeat and evade income taxes due and owing by him for the years 1945 and 1946 in violation of section 145(b) of the Internal Revenue Code, 26 USC, sec. 145(b). He was sentenced to imprisonment and fine on each count. The imprisonment on the second count was to run consecutive to the term of imprisonment on the first count, but was to be suspended conditionally, on payment of his civil tax liability. He is now on bail.

The prosecution's case was wholly dependent upon circumstantial evidence. The evidence of unreported income was presented in the form of "unexplained" expenditures and net worth computations showing an increase in net worth between the beginning and end of the year 1945 and the beginning and end of year 1946. There was no direct evidence of unreported income.

Subsequent to the trial, the petitioner's accountants have examined and analyzed certain authentic records which disclose the source of all of the unexplained expenditures for the year 1945 and part of the unexplained expenditures for 1946. Photostats of those records, consisting of 73 pages, are attached to the original affidavit of John N. Newland, a certified public accountant, filed with the Clerk of this Court. In addition, as shown by Mr. Newland's affidavit, other authentic records of other additional assets, were located by him several months subsequent to the trial. The two groups of assets total $119,012.92. These assets were on hand at the beginning of the year 1945. They were not taken into account by the government witnesses in their unexplained expenditures and net worth computations. They should have been. Had they been, there would have been no unreported income whatever shown in their computations for the year 1945, and their computations for the year 1946 would have been erroneously over-

stated by at least $37,934.49 (or more than 50 per cent). This newly developed evidence shows that the defendant was wrongfully convicted on the first count involving the year 1945, and there is grave doubt of his guilt as to the second count involving the year 1946. The Supplement to the Petition together with the affidavits attached thereto, sets forth these facts.

In view of the unusual circumstances in this case, petitioner prays that the foregoing motion be granted.

ELDEN MCFARLAND
618 Southern Building
Washington 5, D. C.
Counsel for Petitioner

IN THE

Supreme Court of the United States

October Term, 1953

No. 414

AUSTIN F. McFEE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The petitioner, McFee, was indicted, tried by a jury, convicted, sentenced to imprisonment and fined on each of two counts for wilful attempt to defeat and evade income taxes due and owing by him for the years 1945 and 1946, in violation of section 145(b) of the Internal Revenue Code, 26 USC, Sec. 145(b). The terms of imprisonment were to run consecutively. The imprisonment on the second count was suspended conditionally upon payment of all civil tax liability.

The prosecution's case was wholly dependent upon circumstantial evidence. This evidence was presented in the form of "unexplained" expenditures for each of the two years and net worth statements for the beginning and end of each year. The amounts of unexplained expenditures and of increase in net worth were presumed to be taxable

income. There was no other evidence, direct or indirect, of the defendant's receipt of unreported income.

The unreliability and inaccuracy of the circumstantial evidence relied upon by the prosecution as an essential element in this case, is demonstrated by the attached affidavits of John N. Newland, certified public accountant, and Austin F. McFee, petitioner. The records referred to in these affidavits, consisting of 73 pages, are attached to the Newland affidavit, the original of which, together with the original McFee affidavit, have been filed with the Clerk of this Court. These affidavits reliably indicate that the petitioner, McFee, was not guilty of the offense charged in the first count of the indictment covering the year 1945, and probably was not guilty of the offense charged in the second count.

The prosecution witness, Rice, referred to an item of $114,000 which admittedly, was not taken into account in the "unexplained" expenditures and net worth computations upon which the entire case of the prosecution was premised (R. 287-289). The affidavits attached hereto refer to this same item. They demonstrate that, at least to the extent of $119,012.92, the government witnesses' computations were in error. This amount was more than sufficient to account for the "unexplained" expenditures for 1945 (R. 18). And if such amount had been added to the opening net worth computation used by the prosecution for the beginning of 1945, as it should have been, the computation would have shown no net worth increase for 1945 and hence no unreported net income for that year. It also would have shown that the government's computations for the year 1946 were in error to the extent of at least $37,934.49. This casts grave doubt upon the question of criminal liability for the year 1946.

In addition to the amount of $86,528.59 disclosed by the records attached to the Newland affidavit, petitioner's accountants, in working on the settlement of the civil tax liability, subsequent to the criminal trial, have located other

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authentic records of additional assets, also not included by the government witnesses in the criminal trial, amounting to $32,484.33. This is shown by the Newland affidavit. The two amounts erroneously omitted by the government witnesses total $119,012.92.

While it is true that the existence of the records attached to the Newland affidavit were known prior to the end of the criminal trial, the ultimate facts disclosed by those records are not readily discernable and were not known or discovered until after the trial. The existence of the records disclosing the additional amount of $32,484.33 was not known or discovered until several months after the criminal trial.

The foregoing shows that the government's case lacked the essential prerequisite to all net worth-expenditure computations, namely a firm starting point. Cf. *United States* v. *Fenwick*, (7 Cir.), 177 F. (2d) 488, 492; *Bryan* v. *United States* (5 Cir.), 175 F. (2d) 223, 225, affd. 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335; *Gariepy* v. *United States* (6 Cir.), 189 F. (2d) 459, 461; *United States* v. *Venuto* (3 Cir.) 182 F. (2d) 519, 523; *James Quince Whittemore* v. *Commissioner*, 7 T.C.M. 845, 849.

Petitioner respectfully suggests that the case be remanded for retrial.

ELDEN MCFARLAND
618 Southern Building
Washington 5, D. C.

Counsel for Petitioner.

AFFIDAVIT

STATE OF MONTANA }
COUNTY OF SILVER BOW } ss

John N. Newland, being first duly sworn, says:

I am a Certified Public Accountant and have been practicing as such at Butte, Montana for the past ten years. The name of my firm is Newland and Blinn. Our offices are in the First National Bank Building in Butte.

I am familiar with the income tax problems of Austin F. McFee for the period from 1942 through 1946. Our firm represented Mr. McFee in the settlement of his civil income tax liability with the Internal Revenue Agents subsequent to the trial of his criminal case in April 1952. The settlement was mandatory as a practical matter under the terms of the probation arrangement contained in the trial court's criminal sentence.

Attached to this affidavit are true photostats of the bookkeeping records consisting of seventy-three (73) pages which Mr. McFee says reflected his transactions in alcoholic beverages which he obtained in Minnesota, transported to Idaho and distributed at cost and expenses to his own taverns and to other persons who operated business establishments where his vending and other coin operated machines were located. The profits were reflected on the books of the taverns and fully reported as income.

These records appear to be authentic, complete and accurate, and in my opinion they are. If they are authentic they provide a complete defense for Mr. McFee against the criminal charge for which he was convicted for the year 1945. I cannot state at the present time without further verification and comparison with the testimony of the government agents in criminal trial and other sources, the extent to which these records and other cash sources may form a defense for the year 1946. In addition to the amount of $86,528.59 indicated by these records as available to Mr. McFee, and not included by the government witnesses, we

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have located, subsequent to the time of the trial, other records showing an additional amount of $32,484.33 which we believe was also available to Mr. McFee and not included by the government witnesses.

These records record capital transactions. They demonstrate an available source of cash at the beginning of the year 1945 in the amount of $86,528.59 for Mr. McFee's so called "unexplained" expenditures which the government witnesses in the criminal trial included as income for 1945.

The testimony of the government witness Rice (R. 288) referred to this same subject matter as a $114,000 item which he admitted was not included in the opening net worth computation because he thought it was a "turnover" total and not a single item. The attached photostats demonstrate that the government witnesses were in error. The original investment was $109,940.00. This item, if properly treated, would have exonerated Mr. McFee for the year 1945 and probably in part for the year 1946 even under the government's own theory of the case.

The attached records show the original investment which was in August 1943, a cash account subsequent thereto, an inventory record and accounts receivable accounts. Their authenticity is further indicated by the fact that they contain many of the disbursements which were charged against the defendant as income in criminal trial, but which can be traced directly to these accounts and identified as capital and not income.

I was present at the trial of Mr. McFee and heard the testimony of the government agents, Olsen and Rice. After the testimony of Mr. Rice, Mr. McFee located these records in Wallace, Idaho and showed them to his attorneys but the purport of the records was not then realized because it required a more detailed analysis than could be made before the trial ended.

JOHN N. NEWLAND
John N. Newland

Subscribed and sworn to before me this 31st day of October 1953.

RHYNOLD C. AUCH
Notary Public for the State of Montana
Residing at Butte, Montana
My Commission expires August 12, 1956

(SEAL)

(Exhibits attached to original)

AFFIDAVIT

STATE OF MONTANA }
COUNTY OF SILVER BOW } ss

Austin F. McFee, being first duly sworn deposes and says:

I am the petitioner named in the petition for writ of certiorari filed in the Supreme Court of the United States, October term 1953, numbered 414 and entitled Austin F. MeFee vs United States of America;

I have read the affidavit of John N. Newland, dated October 30, 1953, and am familiar with the original bookkeeping records, photostats of which are attached to Mr. Newland's affidavit. Those records were made and kept by my former employee, Helen Knoerr, whose address is 660 Locust Street, Mount Vernon, New York. They were kept in the ordinary course of business, the entries were made at or about the time the transactions which they reflected occurred, and I believe they are truthful, full and correct. The cash and other assets shown therein belonged to me.

In testifying before the trial court in my case, the government witnesses, Internal Revenue Agents Olsen and Rice did not include the assets shown in these accounts in

their computations of "unexplained" expenditures and of net worth for the years 1945 and 1946. If these assets had been included that would have completely cleared me of the charge for 1945 and I believe for 1946 also, inasmuch as there were additional amounts of at least $32,484.33 outside of these accounts not included by the government agents, records of which my accountants have discovered subsequent to my trial. I believe I truthfully reported all income for these two years in my returns as filed.

I am not an accountant or bookkeeper. The accounts attached to Mr. Newland's affidavit are somewhat involved and I did not know at the time of the trial just what the records of the account covering these transactions which occurred some seven or eight years back, would prove or establish, or what facts were needed or supposed to be established in my defense. And I have since learned that my defense lawyers also, were not familiar with accounting. At any rate, during the course of my trial and toward the end of the government's case, Revenue Agent Rice testified that he did not include the assets from this source in his computations because he said it was a "turnover" (R. 288). I knew he was wrong, so that evening I went to Wallace, Idaho and I searched through my papers and records to see what I could find and I found these records which I showed to my lawyers the next day, but the accounts themselves were so involved that they needed examination by an accountant to be sure as to what they meant, and besides it was then too late to get the bookkeeper that actually made the entries, as a witness. She lived in New York.

I intended to testify in my own behalf and expected to be called as a witness. I was much surprised when my at-

torneys suddenly concluded my defense without calling me. I would still like to have the chance to testify.

AUSTIN F. MCFEE
Austin F. McFee

Suscribed and sworn to before
me this 31st day of October 1953.

RHYNOLD C. AUCH
Notary Public for the
(Seal) State of Montana residing
at Butte, Montana. My
Commission expires August 12, 1956.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 133

C. MAXWELL BROWN, - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

LEE S. JONES,
920 Kentucky Home Life Bldg.,
Louisville, Kentucky,

J. WALTER CLEMENTS,
Marion E. Taylor Bldg.,
Louisville, Kentucky,

HELEN R. GRAFT,
Louisville Trust Bldg.,
Louisville, Kentucky,

Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. _____.

C. MAXWELL BROWN, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

C. Maxwell Brown prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on December 8, 1953.

OPINIONS BELOW.

The District Court wrote no opinion. The order of the Circuit Court of Appeals (no opinion) appears in 209 F. 2d 260.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 8, 1953. The order of the Circuit Court of Appeals denying the petition for a rehearing was entered April 20, 1954. An order staying the mandate of the Court of Appeals thirty days was entered April 30, 1954.

The jurisdiction of this Court is invoked under U. S. C., Title 28, Section 1254(1).

QUESTIONS PRESENTED.

1. In a prosecution for alleged income tax evasion, was the admission of testimony of Internal Revenue Service Agent Venable based on information furnished him by the petitioner in the absence of a waiver, a violation of the Fifth Amendment of the United States Constitution, that no person shall be compelled in any criminal proceedings to be a witness against himself? If it was a violation, did the petitioner waive his constitutional right by furnishing the information to the agent under a threat by the agent to compel it by official process and by the agent's representing to the petitioner that the information was for civil purposes, when in fact he then intended to use it for criminal prosecution?

2. Was the trial Court's interpretation of the law to the jury in an income tax evasion case under Title 26, Section 145 (b), based on increases in net worth preju-

dicial error when the Court instructed the jury that if the petitioner willfully filed a false return he is guilty of violating the statute, U. S. C., Title 26, Section 145 (b) as specified in the indictment?

3. Was the petitioner convicted of violating U. S. C., Title 26, Section 145 (a) and (c) in light of the Court's instructions to the jury without an indictment other than a violation of Title 26, Section 145 (b)?

CONSTITUTION INVOLVED.

Amendments to the Constitution, Art. IV, reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendments to the Constitution, Art. V, reads:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES INVOLVED.

U. S. C. Section 145 reads as follows:

"(a) Failure to File Returns, Submit Information, or Pay Tax.—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return, or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return, or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

"(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

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"(c) Any individual who willfully makes and subscribed a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code." (Added 1942 Act and Repealed 8-27-1949.)

U. S. C. Section 3614 reads:

"(a) To Determine Liability of the Taxpayer. —The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

U. S. C. Section 3615 reads:

"(a) General Authority.—It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The

collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned.

"(d) Service.—Such summons shall in all cases be served by a deputy collector of the district where the person to whom it is directed may be found, by an attested copy delivered to such person in hand, or left at his last and usual place of abode, allowing such person one day for each twenty-five miles he may be required to travel, computed from the place of service to the place of examination; and the certificate of service signed by such deputy shall be evidence of the facts it states on the hearing of an application, for an attachment. When the summons requires the production of books, it shall be sufficient if such books are described with reasonable certainty.

"(e) Enforcement.—Whenever any person summoned under this section neglects or refuses to obey such summons, or to give testimony, or to answer interrogatories as required, the collecter may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made,

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to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

U. S. C. Section 3616 reads:

"Whenever any person—

"(a) False Returns.—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or,

"(b) Neglect to Obey Summons.—Being duly summoned to appear to testify, or to appear and produce books as required under section 3615, neglects to appear or to produce said books—he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

U. S. C. Section 3633 reads:

"(a) To Enforce Summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

STATEMENT.

Petitioner is a lawyer in Louisville, Kenutcky. He was indicted on March 2, 1953, by a federal grand jury for violation of U. S. C., Title 26, Section 145(b) (R. 4a). The indictment was in two counts. It was alleged in the first count that he willfully and knowingly attempted to defeat and evade income tax which he owed for the calendar year 1946 by filing a false and fraudulent return, wherein he reported his net income as $6,244.51, and tax as $858.40, whereas, he well knew his net income from salary and legal fees was $16,251.93 and his tax was $4,159.48. The allegations in the second count for the calendar year 1947 are the same as in the first except that the net income reported was the sum of $3,037.09 and the tax was $197.05, whereas, his net income from legal fees was $14,444.96 and tax was $3,411.76 (R. 4a, 5a).

Seven days after he was indicted, petitioner made a motion before the trial Court to suppress all evidence of checks, letters, pleadings, memorandums, names and addresses of clients, statements and schedules identified as being a part of the records of the defendant, and obtained from him in his private office in the Louisville Trust Building, Louisville, Kentucky, by Mr. Edward Brumleve and Levoy Venable, agents of the Bureau of Internal Revenue of the United States (R. 8a). The trial Court heard evidence on the motions on March 10, 1953. Petitioner testified that agent Brumleve came to his office at 9:15 o'clock on January 3, 1950, and introduced himself as an agent

of the Bureau of Internal Revenue and stated that he wanted to make a routine check, and the first thing he wanted to examine was the safe-deposit box and to check records and files. Petitioner objected that he had no right to examine the box. Brumleve insisted that he did have such a right in making a routine check, and he became excited and his face became red. He said, "Now, it is either a question of you letting me look in the box or you face Judge Shelbourne by Court order." Petitioner then let him inspect the box, and he returned the next morning and was followed within a few minutes by Mr. Venable. Petitioner again objected to his looking at his records and Mr. Brumleve repeated that he would compel petitioner to give up the records by Court order (R. 34a, 35a, 36a). Petitioner believed him and let him see the records (R. 41a, 42a). Agent Brumleve admitted that he told petitioner he was making a routine check (R. 27a) and he examined the safe-deposit box on his first visit. In answer to the question whether the petitioner objected to his examination, Mr. Brumleve said, "I don't know what you would call objection, I don't think he did" (R. 28a). He asked me, "Why are you checking me?" I said, "Well, it is a routine check" (R. 32a).

Agent Venable testified:

"Q. Tell the jury what is the nature of your work, is that to discover fraud?

A. It is not necessarily discovering fraud. The agents usually discover fraud before we go

in. Our job is to develop fraud cases for prosecution.

Q. Did Mr. Brumleve call you in on this case?

A. Yes.

Q. When did he call you in?

A. On this day, on the 4th.

Q. That meant he had discovered fraud?

A. That meant he thought he had discovered fraud, yes."

Petitioner made available to agents Brumleve and Venable all of his records, including his private files, cancelled checks and bank statements (R. 160a). He surrendered this evidence under threat of Court order to compel it (R. 40a, 41a).

The trial Court, without giving any reason, declined to suppress the evidence thus obtained (R. 9a, 10a) and again after agent Venable admitted that Brumleve called him into the case to verify fraud for criminal prosecution, petitioner sought to lay a foundation to exclude the testimony of Mr. Venable by testifying at his trial how the evidence was obtained by deceit and threat, but the trial Court declined to permit him to so testify (R. 159a, 218a). Agent Brumleve did not testify at the trial. Agent Venable further testified that he examined petitioner's cancelled checks, bank statements and a list of fees (R. 106a).

At the conclusion of the Government's case, defendant moved the Court for a directed verdict of acquittal (R. 155a).

Petitioner in his motion for a new trial, paragraph 13a (R. 14a, 15a), again raised the same point

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that the evidence of Venable was obtained from the petitioner by coercion contrary to the Constitution of the United States (R. 15a). He urged the same point before the United States Court of Appeals (R. 22a-31a).

Petitioner was appointed Assistant County Attorney for Jefferson County in July, 1940, and served in that capacity until January 6, 1946. During the same period and thereafter he engaged in some private practice of law (R. 157a).

The sources of his income were wages from his employment and fees from his law practice. He reported all of his income in the calendar year in which it was received except in certain cases of private practice he had a contingent fee agreement with the client to refund any fee received in event, due to official duties, he was unable to conclude the entire case and in these cases he reported the fees in the year in which the case was completed. In the year 1946 such fees were received in the sum of $7,300.00 and reported in 1949 when the cases were completed. In 1947 such fees were received in the sum of $5,700.00 and reported in 1948 and 1949 when the cases were completed (R. 163a, 164a, 172a). He was advised by counsel on how to report contingent fees (R. 165a). A main point in this case revolved around whether the contingent fees were reportable for tax in the year when received or in the year when the contingency occurred. The Government rested its case on proof of taxable income by a statement of increases in net worth (R. 18a 107a).

Petitioner claimed that the net worth statement was in error in including the contingent fees, and also in excessive living expenses and in omitting beginning assets. The trial Court permitted the Government to produce in evidence as Exhibit 27 (R. 18a) a statement of net worth for each year beginning with 1942 and ending with 1948 over the objection of the petitioner although only the years 1946 and 1947 were involved (R. 118a).

Petitioner offered Instruction No. X to conform with each count of the indictment as follows:

> "You are instructed that the defendant is not charged in this indictment with an intentional and wilful failure to make a return and pay a tax, but he is charged with a much more serious offense of attempting to evade and defeat a large part of his income taxes by false and fraudulent statements contained in his income tax returns for the years in question.
>
> "A fraudulent statement is a false statement made by a person knowing at the time it was made that it was false and made with the intent and purpose to deceive and mislead some person.
>
> "So that one of the material allegations in each one of the counts on the indictment is that the defendant attempted to defeat and evade a large part of the income tax due from him, substantially as charged in that Count by filing or causing to be filed with the Collector of Internal Revenue a fraudulent income tax return containing the statement substantially as set out in that Count of the indictment, and that such statements when made

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> were false and known by the defendant to be false, and were made with the intent on the part of the defendant to conceal from the said Collector of Internal Revenue defendant's true and correct gross and net income received by him during the calendar years substantially as set out in such Count of the indictment; and in this manner attempted to defeat and evade that part of the tax which was not reported by him in his income tax return for the year in question" (R. 49a).

The Court did not give the instruction offered by petitioner.

Petitioner objected to the Court's instruction when it was given to the jury (R. 228a) and again in his motion for a new trial (Item 11, R. 14a) and on appeal to the United States Court of Appeals (R. 3a).

Petitioner reported contingent fees following advice of tax counsel and paid the tax on the fees in the year in which the contingency terminated (R. 164a-165a). *Allen* v. *Com.*, 5 T. C. 1232.

The Court instructed the jury on this issue as follows:

> "* * * This is a criminal case, and the fact that the defendant has or may have or may have not paid or settled the civil liability for the taxes involved in these years is not in and of itself evidence of a defense—it is not a defense in and of itself to the charges embodied in this indictment * * * (R. 224a).

REASONS FOR GRANTING WRIT.

Petitioner urges that his petition for certiorari should be granted because issues are involved which are important in the administration of the Internal Revenue laws and important in their effect on those accused of income tax evasion. The decisions below are in conflict with decisions of Courts of Appeals in other circuits.

1. The decisions below were adverse to the petitioner on the issue of whether or not in prosecution for alleged income tax evasion, admission of the testimony of an internal revenue agent, Venable, based on information furnished him by the petitioner in the absence of a waiver, was a violation of the Fifth Amendment of the United States Constitution in that no person shall be compelled in any criminal proceedings to be a witness against himself. And if it was a violation, did the petitioner waive his constitutional right of immunity by furnishing the information to the agent under a threat by the agent to compel the information by official process and by the agent representing to the petitioner that the information was for civil purposes, when in fact he was then intending for criminal prosecution?

These specific issues have never been decided by this Court.

The decisions below in the instant case are in conflict in principle with the decisions of this Court in the case of *Boyd* v. *U. S.*, 116 U. S. 616, and also in the

case of *Go-Bart Importing Company* v. *U. S.*, 282 U. S. 344.

The decisions below in the instant case were adverse to the petitioner without an opinion. The result is in conflict in principle with the Eighth Circuit in the case of *Hanson* v. *U. S.*, 186 F. 2d 61.

The decisions below in the instant case are in conflict in principle with the Tenth Circuit in the case (non-tax) of *Bowles, etc.* v. *The Beatrice Creamery Company*, 146 F. 2d 744.

The decisions below in the instant case are in accord in principle with the Third Circuit in the case of *Nicola* v. *U. S.*, 72 F. 2d 780.

The decisions below in the instant case are in conflict in principle with the Court of Appeals of the District of Columbia in the case (non-tax) of *Nelson* v. *U. S.*, 208 F. 2d 505.

The decisions below in the instant case are in accord in principle with the Fifth Circuit in the case of *Montgomery* v. *U. S.*, 203 F. 2d 887.

2. Was the trial Court's interpretation of the law to the jury in an income tax evasion case under U. S. C., Title 26, Section 145 (b), based on increases in net worth prejudicial error when the Court instructed the jury that if the petitioner willfully filed a false return he is guilty of violating the statute meaning Title 26, Section 145 (b), as specified in the indictment?

Petitioner objected to this instruction when it was given. It presented to the jury a single issue on which to determine guilt and it diverted the jury from con-

sideration of other equally important issues of whether the petitioner had knowledge that the return was false, whether he had intent to evade tax, whether a tax was in fact due and whether the Government's evidence, based upon a statement of increases in net worth was erroneous in omitting beginning assets, in omitting a return of capital from sale of furniture and in exaggerated living expenses.

The decisions below in the instant case are in conflict in principle with the decision of this Court in the case of *Spies* v. *U. S.*, 317 U .S. 492.

The decisions below in the instant case are in conflict in principle with the Third Circuit in the case of *Caserta* v. *U. S.*, 199 F. 2d 905, and in the Fifth Circuit in the case of *J. Demetree* v. *U. S.*, 207 F. 2d 892.

Petitioner's objection to this instruction is that it limited the offense to a misdemeanor without giving a correct instruction to the jury concerning the consideration which should be given to the Government's net worth statement.

The instruction which the Court gave on this point follows:

> "The Government has introduced in evidence here testimony of defendant's net worth or the increase in net worth or estate, beginning with what is called a basic date—that is, December 31st, 1945, which establishes the worth as of the first day of the calendar year 1946. Then if the testimony will properly show all of his assets and all of his property at the end of that year, then the

difference in those two amounts will reflect the income" (p. 223a).

This instruction is erroneous in that it failed to take into account liabilities, namely, $15,000.00 which the petitioner borrowed from the Citizens Fidelity Bank. It failed to take into account a correct net worth starting point. It assumed the beginning net worth as an established fact.

The decisions below in the instant case are in conflict with the Fifth Circuit in the case of *Bryan* v. *U. S.*, 175 F. 2d 223, in that the net worth statement was not definitely established and the instruction concerning it was in error. The case of *U. S.* v. *Fenwick*, 177 F. 2d 488, in the Seventh Circuit, and also, the case of *U. S.* v. *Calderon*, 207 F. 2d 277, in the Ninth Circuit are to the same effect.

The decisions below in the instant case are in accord with the Tenth Circuit in the case of *Holland, et al.* v. *U. S.*, 209 F. 2d 516.

The decisions below in the instant case are in conflict in principle with the Ninth Circuit in the case of *Remmer* v. *U. S.*, 205 F. 2d 277.

The decisions below in the instant case are in conflict with the Third Circuit in the case of *Morris* v. *U. S.*, 156 F. 2d 525, and *U. S.* v. *Pincourt*, 159 F. 2d 917, in that it is the duty of the trial Court to correctly instruct the jury with respect to the statute governing the offense as well as the facts set forth in the indictment.

Petitioner urges that the instruction given here was prejudicial error and as stated by the Court in *Spies* v. *U. S., supra,* he

> "* * * is entitled to a charge which will point out the necessity for such an inference of willful attempt to defeat or evade tax from some proof in the case other than that necessary to make out the misdemeanors; and if the evidence fails to afford such an inference the defendant should be acquitted."

3. Was the petitioner convicted of violating U. S. C., Title 26, Section 145 (a) and (c) in the light of the Court's instructions to the jury without an indictment other than for violation of Title 26, Section 145 (b)?

The trial Court instructed the jury as follows:

> "In this case the positive acts are said by the Government to be the filing of a false return in each of the years. I charge you that if the acts were wilfully done, they are sufficient to constitute the violation of the statute here involved" (p. 225a).

This instruction covers Title 26, Section 145 (c), which was added by the 1942 Act and was in effect during the years involved, 1946 and 1947, but repealed 8-27-1949. The Court further instructed the jury as follows:

> "If you should find, however, that the defendant knowingly and wilfully failed to keep proper records or to honestly report his income and should

find beyond a reasonable doubt such failure was for the purpose of having the returns show a lesser tax than was really due, then your verdict should be guilty if consistent with the other principles which I have given under the law" (p. 227a).

This instruction covers Title 26, Section 145 (a). It directs the jury to infer intent to evade tax from evidence of a violation of Section 145 (a).

The decisions below in the instant case are in conflict with *U. S.* v. *Spies, supra.*

The decisions below in the instant case are in conflict in principle with the Third Circuit in the cases of *U. S.* v. *Levy,* 153 F. 2d 995, and *U. S.* v. *Noble,* 155 F. 2d 315, in that the Court is required to instruct the jury with respect to the statute governing the opinions set forth in the indictment.

The issues raised here are common in the administration of the Internal Revenue Statutes and they are of vital importance to both the Government and the taxpayers involved. On account of the conflict and variations and views expressed by the trial Courts and by the Appellate Courts, it is urged that in the public interest these issues should be resolved by a decision of this Court.

ARGUMENT.

1. The admission of the testimony of Internal Revenue Agent Venable was a violation of the petitioner's right of immunity under the Fifth Amendment of the United States Constitution unless this issues comes within the principle of required records as applied in the case of Shapiro v. U. S., 335 U. S. 1.

We urge that this case does not come within that principle.

If it was a violation, did the petitioner waive his constitutional right by furnishing the information to the agent under a threat by the agent to compel it by official process and by the agent's representing to the petitioner that the information was for civil purposes when, in fact, he then intended to use it for criminal prosecution?

On January 3, 1950, the day revenue agent Brumleve first visited with the petitioner, the revenue agent knew that he was initiating a criminal case. He called special agent Venable to join him in the case and the following morning, January 4, 1950, the two of them went to the petitioner's office for an interview (R. 132a).

In answer to the question whether the petitioner objected to giving information to the agent, Mr. Brumleve said: "I don't know what you would call objection, I don't think he did" (R. 28a). He ask me "why are you checking me? I said, Well it is a routine check" (R. 32a). He gave this testimony on the preliminary motion to suppress evidence, but

noticeably he did not testify at the trial, although he was at the trial (R. 132a).

Special agent Venable admitted on cross-examination that he was called in the case because agent Brumleve thought he had discovered fraud on January 3d, and Mr. Venable joined him in the case on the morning of January 4th, to develop a fraud case for prosecution (R. 127a).

These facts disclose misrepresentation to the petitioner and show deceit to obtain information from him. A waiver is based upon consent and petitioner was led to believe that the agents were not seeking criminal prosecution but that they were making a "routine check" of a civil liability as they were permitted to do under U. S. C., Title 26, Section 3614. They threatened Court action to compel him to give the information for that purpose.

The conduct of the revenue agents in this case discloses a pattern of approach to taxpayers in the administration of revenue laws. In the case of *U. S.* v. *Montgomery, supra,* the agent explained to the taxpayer that he desired to make a "routine check". In the case of *U. S.* v. *Lipshitz,* 117 F. Supp. 466, the agent explained to the taxpayer that he was making a "routine examination" of a partnership return when in fact he intended criminal prosecution. In the case of *U. S.* v. *Wolrich,* 119 F. Supp. 538, the revenue agent explained to the taxpayer that he was making the "usual routine audit" and introduced the special agent as a "fellow revenue agent".

The 1950 report of the American Bar Association's Committee on procedure in fraud cases states:

> "The bureau officials seem to feel * * * that a practice of advising taxpayers of their constitutional rights at the beginning of a special agent investigation would unduly alarm a large proportion of those investigated whose cases are dropped after a routine check."

Alarm created by advising taxpayers of their constitutional rights at the beginning of a fraud investigation is one thing and the alarm resulting from a loss of constitutional rights by being misled at the beginning of a fraud investigation is altogether another thing.

The trial Court in the case of *U. S.* v. *Guerrina,* 112 F. Supp. 126, Third Circuit, recognized this alarming situation and treated the issue as one of first impression and declined to follow in principle the case of *Nicola* v. *U. S., supra,* in the same circuit and expressly followed the principle declared in the Eighth Circuit in the case of *Hanson* v. *U. S., supra.* This decision is in accord in principle with the decision of this Court in the case of *Gouled* v. *U. S.,* 255 U. S. 298. In the Seventh Circuit, in the case of *U. S.* v. *Manno,* 118 F. Supp. 511, the defendants contend that Government agents by stealth and misrepresentation obtained permission to examine books; that they were to be examined for civil liability and not with a view to criminal prosecution. The Government contended that the books were made available voluntarily to the

agents. The District Court expressed the same principles declared in the case of *U. S.* v. *Guerrina, supra,* but it decided the issue in favor of the Government upon a finding of fact unlike the instant case that criminal prosecution was not contemplated when the revenue agents interviewed the defendant and also found that when evidence of criminal fraud was uncovered the agents warned the defendants that the matter would be referred to the intelligence division.

In *Nicola* v. *U. S., supra,* it was held that the defendant must claim and stand on his right of immunity before the revenue agent and refuse to produce his books or evidence. The defendant is placed in peril of being in violation of Title 26, Section 145 (a), or waiving any right which he may have under the Constitution.

Consent to giving information waives the constitutional immunity, but it was held in principle in *Go-Bart Importing Co.* v. *U. S., supra,* and in the Fifth Circuit in the case of *Ray* v. *U. S.,* 84 F. 2d 654, that such consent must not be induced by misrepresentation, fraud, trickery, promises or threats.

Petitioner believed that the agents had authority under U. S. C., Title 26, Section 3615, to compel him to give information for civil purposes and subject him to punishment for willful failure to do so. He would have no defense to such action if the agents were in fact seeking information only for civil purposes.

Acquiescence reasonably attributable to a regard for authority of the law is not a waiver. *Amos* v. *U. S.,* 255 U. S. 313 (non-tax case).

Petitioner raised this issue before the trial Court on motion to suppress evidence and to dismiss the indictment, on motion for a directed judgment of acquittal, on motion for a new trial and also before the Court of Appeals. He stands in the same position of innumerable persons who are under examination in the administration of the internal revenue laws and whose constitutional rights are denied in the zeal of the examining agents to acquire, in a wrongful way, vital evidence on which to base an inference or proof of tax evasion. This issue is in need of clarification and decision by this Court.

2. Was the trial Court's interpretation of the law to the jury in an income tax evasion case under Title 26, Section 145 (b) based on increases in net worth prejudicial error when the Court instructed the jury that if the petitioner willfully filed a false return he is guilty of violating the statute, U. S. C., Title 26, Section 145 (b) as specified in the indictment?

The trial Court oversimplified the Government's case by instructing the jury that if the petitioner filed a false return he is guilty of violating the statute. Coupled with this instruction the Court erroneously instructed the jury further:

> "The Government has introduced in evidence here testimony of the defendant's net worth or the increase in his net worth or estate, beginning with what is called a basic date—that is, December 31st, 1945, which establishes the worth as of the first day of the calendar year 1946. Then if the testi-

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mony will properly show all of his assets and all of his property at the end of that year, then the difference in those two amounts will reflect the income" (R. 223a).

The Government based its case against the petitioner on proof of increases in net worth (R. 18a).

The years involved were the calendar years 1946 and 1947. The net worth exhibit covered the calendar years 1942 through 1948, inclusive (R. 18a). This involved a defense as to five years not specified in the indictment over petitioner's objection. The Government undertook to support the statement of increases in net worth by testimony of special agent Venable who accepted as true those extra-judicial statements which he claimed that the petitioner made to him and were favorable to the Government's net worth statement, and Mr. Venable rejected those extra-judicial statements which he claimed the petitioner made to him and were unfavorable to the Government's net worth statement. Specifically he asked the taxpayer about his cash on hand in 1945 and was told that it amounted to about $10,000.00. In the net worth statement Mr. Venable rejected cash on hand at any time (R. 128a, Exh. 18a). All checks payable to cash were treated as living expenses in the net worth statement and the petitioner's statement that many of such checks were for business expenses was wholly disregarded. The petitioner's statement to Mr. Venable concerning assets on hand at the beginning of the period which belonged to his wife, consisting of cash

and furniture which was sold during the years involved, were wholly disregarded in the net worth statement.

This method of proof on the part of the Government in its attempt to support the net worth statement was not only insufficient to sustain the burden of proof as to the issues in the case but it had the effect of shifting the burden of proof to the petitioner so that he was compelled to endeavor to carry the burden of disproving the conclusions made by the special agent Venable and incorporated in the net worth statement. Petitioner objected to this proof and moved to exclude it (R. 113a). At the conclusion of the Government's case the petitioner again moved for a judgment of acquittal (R. 155a). In his motion for a new trial, petitioner urged the same point (R. 15a). The same point was argued before the Court of Appeals.

The decisions below on this issue are in conflict with the principles recited in the opinion by the Court of Appeals for the Third Circuit in the case of *U. S.* v. *Caserta, supra,* and the Court said:

> "The cases show, however, a rather surprising rule that when the discrepancy between increased net worth and reported income is shown, the burden of explanation shifts to the taxpayer, at the same time repeating the usual criminal law rule that the burden throughout a criminal case is upon the prosecution."

The Court of Appeals for the Fifth Circuit in the case of *U. S.* v. *Demetree, supra,* expressed a similar

opinion in equally strong language as in *U. S.* v. *Caserta, supra.*

In the Tenth Circuit the Court of Appeals in the case of *Holland, et al.* v. *U. S., supra,* had before it a net worth case of income tax evasions wherein the evidence disclosed the beginning net worth uncertain and yet in that case as in the instant case the judgment of conviction was sustained. This result is in direct conflict with the principles declared in the cases of *U. S.* v. *Caserta, supra,* and *U. S.* v. *Demetree, supra.*

The trial Court's refusal to enter a judgment of acquittal at the conclusion of the Government's case enabled the Government to elect what findings it would accept and what findings it would reject and advance only those favorable to the Government to sustain its burden of proof in the case. This issue was involved in the Fifth Circuit in the case of *Bryan* v. *U. S., supra,* and also in the Seventh Circuit in the case of *U. S.* v. *Fenwick, supra,* and also in the Ninth Circuit in the case of *U. S.* v. *Calderon, supra.*

The trial Court failed to instruct the jury clearly on the essential elements of the crime defined in the statute. The Court's instruction was too narrow and inaccurate.

Petitioner received fees subject to contingencies and reported them and paid the tax on them upon the termination of the contingency and he did this according to a consistent manner and in accordance with legal advice. His action was based upon the law of the case

of *Allen* v. *Comm.*, 5 T. C. 1232. If he were correct in so reporting his income which was not taken into account in his favor in the Government's proof a good defense would result in the fact that he owed no tax. The trial Court charged the jury that his evidence on this issue was not a defense but that it was admitted in evidence on the issue of intent. This necessarily gave the jury the impression that intent to evade tax was not an element of defense and the Court overemphasized this impression by its instruction that if the petitioner willfully filed a false return he was guilty as charged.

The decisions below in the instant case are in conflict in principle on this issue in the Third Circuit in the case of *U. S.* v. *Levy*, 152 F. 2d 995, and also in the same Circuit in the case of *U. S.* v. *Pincourt*, 159 F. 2d 917.

3. Was the petitioner convicted of violating U. S. C., Title 26, Section 145 (a) and (c) in light of the Court's instructions to the jury without an indictment other than for a violation of Title 26, Section 145 (b)?

The precise issue here is whether or not an instruction which covers Section 145 (a), coupled with an instruction which covers Section 145 (c), is sufficient under an indictment which charges a violation of 145 (b).

In *Spies* v. *U. S.*, *supra*, this Court had before it the question, whether proof and a charge of multiple violation of Section 145 (a) was sufficient under an

indictment which charged a violation of Section 145 (b). There is a difference in the two issues. It is evident that the trial Court was endeavoring to follow the principles of laws announced in *Spies* v. *U. S.*, *supra,* by the numerous use of almost identical phrases in the instructions. It is believed that the Court drifted into error which was prejudicial to the petitioner.

Other important issues appear in the case and were urged before the trial Court and before the Court of Appeals.

A juror during the process of the trial disobeyed the admonition of the Court and procured evidence on his own initiative which was used to influence other jurors to convict. This was established by an affidavit of another juror, and contradicted by the one accused. Relief on this was denied by the trial Court and by the Court of Appeals.

The decisions below in the instant case are in conflict in principal with the Eighth Circuit in the case of *Wheaton* v. *U. S.,* 133 F. 2d 522.

The decisions below in the instant case are probably in conflict with the decision of this Court in the case of *Mattox* v. *U. S.,* 146 U. S. 140.

The decisions below in the instant case are probably in conflict with the decision of this Court in the case of *Clark* v. *U. S.,* 289 U. S. 1.

The decisions below in the instant case are in conflict in principle with the Ninth Circuit in the case of *Remmer* v. *U. S.,* 205 F. 2d 277.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 133

C. MAXWELL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Court of Appeals wrote no opinion. Its *per curiam* order (R. 235-236) affirming the decision of the District Court is reported at 209 F. 2d 266.

JURISDICTION

The judgment of the Court of Appeals was entered December 8, 1953 (R. 235-236), and a petition for rehearing was denied April 20, 1954 (R. 253). On May 11, 1954, by order of Mr. Justice Reed, the

time for filing a petition for certiorari was extended to June 15, 1954. The petition was filed on June 14, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether petitioner's disclosure of certain evidence was the result of deception and coercion on the part of the revenue agents.

2. Whether the Government's net worth computation, which actually did little more than corroborate the proof of specific items of unreported income, sufficiently demonstrated increases in net worth, and whether the pertinent instruction was adequate in the circumstances of this case.

3. Whether the wilful filing of a false income tax return constitutes a wilful attempt to evade and defeat income taxes in violation of Section 145(b) of the Internal Revenue Code.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

(a) [as amended by Section 5(c), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126] *Failure to file returns, submit information, or pay tax.* Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under

authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) [as added by Section 136(b), Revenue Act of 1942, c. 619, 56 Stat. 798] Any individual who willfully makes and subscribes a

return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code.

* * * * * * *

(26 U. S. C., 1952 ed., Sec. 145.)

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Kentucky, under Section 145(b) of the Internal Revenue Code, for willfully attempting to evade his income taxes for the years 1946 and 1947 by filing fraudulent returns. (R. 4-5.) The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count 1 (1946)	$6,244.51	$858.40	$16,251.93	$4,159.48
Count 2 (1947)	3,037.09	197.05	14,444.96	3,411.76

After a jury trial petitioner was found guilty as charged (R. 12), and on May 4, 1953, he was sentenced to imprisonment for a year and a day and fined $5,000 (R. 3-4.)

Petitioner has been a practicing attorney since 1929. For six years he prosecuted criminal cases as a county attorney and at one time held a card entitling him to practice before the Treasury Department. (R. 37-38.) After the indictment had been returned in this case, a motion was filed to

suppress certain evidence obtained from him by internal revenue agents. It was alleged that when Agent Brumleve first called upon petitioner on January 3, 1950, he asked to see petitioner's records and the contents of his safe deposit box; that petitioner refused, and said that he did not believe the agent had the right to make such a demand and that he desired to consult counsel; that the agent became angry and said he would get a court order directing that he be allowed to make the inspection; and that petitioner then allowed the agent to inspect both the box and the records. (R. 6-8.) There was a hearing on the motion at which Agent Brumleve testified that when he first called on petitioner he explained that he was making a routine check and would like to examine the records and safe deposit box, and that petitioner let him examine the box that day but procrastinated for several days before turning over the records. The agent denied that petitioner had objected or that he had told petitioner that he would get a court order permitting the inspection. (R. 26-33; cf. R. 106-107.) On many essential points the testimony of the agent squarely contradicted the testimony of petitioner. (R. 33-45.) Petitioner admitted that he had consulted another attorney before turning over his records. (R. 40-43.) The court denied the motion. (R. 9-10.)

At the trial, Agent Venable testified that he had examined such records as petitioner made available. Petitioner gave him a list of the legal fees

which he had reported as income for 1946 and 1947. However, the agent investigated the records of third parties and discovered numerous other fees paid to petitioner during these years but not reported. (R. 106-107.) These amounted to $4,059.69 in 1946, and $5,211.66 in 1947. (R. 123-124.) Petitioner admitted receipt of these fees.[1] He testified that he had accepted them from clients under contracts to refund all or part of the fees if he should be unable to see the cases through; that he completed the work on these cases in 1948 and 1949; and that he reported the fees on his returns in those years instead of in the years they were received. (R. 158-159, 163-173.) However, many of the clients with whom these alleged contracts were made appeared as witnesses, and none testified as to any such contract.[2] In fact, their testimony indicated that petitioner had completed the cases and had earned his fees in 1946 and 1947. (R. 59-61, 68, 75-76, 78, 80, 83-84, 86-87, 90-92, 94-100, 102-103, 106, 108-109.) Furthermore, the office files petitioner kept on these cases contained no evidence of any such contingent contracts. (R. 199-203.) It appeared that almost all of these fees had been reported by petitioner in his 1949 return, which was filed several months after he knew he was under investigation. (R. 172-173, 204-205.)

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[1] In fact his figures were larger than the agent's. He admitted receipt of unreported fees amounting to approximately $7,300 in 1946, and $5,700 in 1947. (R. 164.)

[2] With one possible exception concerning a fee of $600. (R. 73-75.)

He was able to produce lists of such contingent fees only for the years 1946 and 1947 (again, these lists were prepared after the investigation had begun), although he testified that he had been following this plan since 1941, and he could not recall what fees he had carried over in this manner in other years. (R. 164, 166-171, 186-190, 192-194.) Finally, he had stated on direct examination that he tried to keep a reserve in his safe deposit box to cover these contingent fees and that this amounted to about $1,500 at the end of 1947 (R. 175-177), but he was unable to give any satisfactory explanation when it was pointed out to him on cross-examination that he had already testified that the total of such fees at the end of 1947 was about $12,000 (R. 206-209).

During the investigation petitioner hired a firm of accountants who prepared a net worth statement based upon all the information petitioner gave them. (R. 145-147, 150-151, 154.) No contingent liability was set up for fees to be returned. (R. 152, 154.) The accountants compared their statement with a similar one prepared by the Government's agents. The items were the same in both and the results were found to be within a few hundred dollars of each other. (R. 120-122, 146-147, 154, 183, 191-192, 215-216.) The accountants' computation showed unreported income of approximately $10,000 in 1946 and $11,600 in 1947. (R. 216.) Petitioner admitted that if the increases

in his net worth were properly computed the money came from legal fees. (R. 192.)

ARGUMENT

1. Petitioner contends (Pet. 8-11, 14-15, 20-24) that he was deceived and coerced into turning over his records and permitting the agents to examine the contents of his safe deposit box, and that the trial court erred, therefore, in denying his motion to suppress evidence. The simple answer is that the testimony of petitioner and Agent Brumleve at the hearing presented issues of fact, and Brumleve's testimony justified a finding that there was neither deception nor coercion.

As to deception, Brumleve testified that he told petitioner at the outset that he was making a routine check and would like to examine his safe deposit box and records; that petitioner made no objection and allowed him to examine the box that day; and that the records were turned over after several days delay. (R. 26-33.) Petitioner testified that, before permitting examination of his records, he believed that the investigation had a criminal aspect (R. 42), and he admitted that he consulted another attorney before allowing the examination (R. 41-43). And there is nothing in the agent's testimony to indicate that he represented to petitioner that his investigation was for civil purposes only.[3] On the evidence, it was proper

[3] Nor is there anything to indicate, as petitioner asserts (Pet. 24), that Brumleve knew he was initiating a criminal prosecution. As a revenue agent, his duties were to make a

to conclude that there was no misrepresentation and that petitioner was fully aware of the possible consequences when he consented to the examination.

As to coercion, Brumleve flatly denied that he had threatened to get a court order. (R. 28.) Here again, the issue was one of fact. Moreover, petitioner's testimony that he was unaware of the constitutional privilege against self-incrimination is patently incredible in view of his six years' experience as a prosecuting attorney. (R. 38-43.) The evidence justified the conclusion that the records were turned over voluntarily and without objection.

2. As the trial court pointed out in its instructions, this is at most only "partially" a so-called net worth case. It is clear from the petition itself (pp. 11, 13, 27-28) that there was proof of substantial specific fees received and unreported by petitioner in the two years covered by the indictment. The central issue at the trial was whether these sums were properly reportable for later years (as petitioner reported them after investigation of his returns had been under way for some months, *supra*, p. 6) or whether they were unlawfully and wilfully omitted from petitioner's returns for the years in which they were received. In the circumstances, petitioner's vague attacks (Pet. 11-12, 15-

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routine check of income tax returns. If he discovered evidence of fraud, he called in a special agent to develop that aspect of the case. Brumleve called Special Agent Venable into the case after his first visit. (R. 127.)

18, 24-28) on the sufficiency of the Government's net worth computation and on the instructions relating to this aspect of the evidence are clearly without substance.

Admitting that he had received and failed to report considerable amounts of legal fees, petitioner claimed that these fees were contingent on his completion of services and only became income in later years following such completion.[4] The evidence contradicting this testimony amply justified the conclusion that the explanation was false. See pp. 6-8, *supra*. What is important here, however, is the fact that the Government's net worth computation simply corroborated that part of the case which petitioner admitted. Petitioner himself points out (Pet. 28) that had his explanation of the unreported fees been credited, it would have followed that he owed no additional taxes for the years in question and could not have been guilty of an unlawful attempt at evasion.[5] The effect of this observation is an acknowledgment of the plain fact that it was the alleged explanation of petitioner's failure to report fees he admittedly received, not the sufficiency of the corroborating net worth state-

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[4] The results of the Government's net worth computation indicated amounts of unreported income somewhat larger than the amount of specific fees proved and admitted. However, petitioner's own accountant had reached practically the same figures in his net worth computation. *Supra*, p. 7.

[5] Petitioner couples this statement, in which we concur, with an assertion that the jury was improperly charged on this point. As we show below (pp. 12-13), there is no basis for his contention that the trial court's instructions omitted the element of intent to evade tax in defining the offense.

ments, which presented the decisive problem for the jury's determination.[6]

As an abstract proposition, the trial court's instruction on the subject of the net worth computation (R. 223-224) may be open to criticism in that it does not clearly point out that the annual increases in net worth must be traceable to taxable income. But there was no objection to this portion of the charge. (R. 228.) And this procedural flaw in petitioner's contentions here reflects the substantive answer already noted—that the adequacy of the net worth analysis made no difference in view of the uncontroverted showing of unreported fees.

3. While they are not altogether clear or clearly distinguished in the petition from the contention discussed in the previous point, petitioner appears to make two further, closely interrelated arguments (Pet. 12-13, 15-16, 18-19, 24, 28-29): First, that the wilful filing of a false return is not sufficient to constitute a wilful attempt to defeat and evade tax in violation of Section 145(b), but could only be charged as a misdemeanor under Section 145(a) (prohibiting *failure* to file returns, etc.) or a felony under Section 145(c) (condemning wilful making of false returns). Second, that the trial court's instructions, permitting a verdict of guilty upon a

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[6] The four cases upon which petitioner relies, in which this Court recently granted certiorari, are clearly distinguishable, for in all of them the Government was forced to rely almost entirely upon the net worth method to prove unreported income. *Friedberg* v. *United States*, No. 18; *United States* v. *Calderon*, No. 25; *Holland* v. *United States*, No. 37; *Smith* v. *United States*, No. 52.

finding that petitioner had wilfully filed a false return, omitted essential elements of the offense. Both contentions are plainly without merit.

As to the first, the recent decision in *United States* v. *Beacon Brass Co.*, 344 U. S. 43, approving a rule consistently followed by the courts of appeals, leaves no doubt that wilfully false statements, whether oral or written, are sufficient to constitute the attempt to evade denounced by Section 145(b). See, *e.g.*, *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C. A. 1), certiorari denied, 340 U. S. 917; *Cave* v. *United States*, 159 F. 2d 464, 466 (C. A. 8), certiorari denied, 331 U. S. 847. The same decision refutes the suggestion that because the wilful filing of a false return may have violated another statute, Section 145(c), it could not also be an offense under Section 145(b). See, also, *United States* v. *Noveck*, 273 U. S. 202, 206; *Gavieres* v. *United States*, 220 U. S. 338.[7]

As for the instructions, petitioner's complaints largely rest upon and fall with the erroneous argument that the wilful filing of a false return was

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[7] Petitioner's reliance upon *Spies* v. *United States*, 317 U.S. 492, is obviously misplaced. The *Spies* case requires, in order to sustain a conviction under Section 145(b), that there be proof of some affirmative action in which the "tax-evasion motive plays any part," where it has been charged that the attempted evasion was committed by means of a wilful *failure* to make a return and *failure* to pay a tax, derelictions which are misdemeanors under Section 145(a). 317 U.S. at 499. But *Beacon Brass* makes it clear that wilfully false statements, the most obvious form of attempted evasion under our system of tax collection, may complete the offense under Section 145 (b).

insufficient to establish his guilt. It may be added, however, that the trial court's instructions clearly required for conviction a finding that petitioner had not only failed to pay the tax that was due and owing, but had also attempted by some positive and affirmative act to evade the tax. The charge amply demonstrated to the jury that they must find an additional tax owing and a conscious and wilful attempt to evade it. (R. 219, 222-223, 224-227, 228.) These instructions, covering in substance the requested charge petitioner quotes (Pet. 12-13) and claims should have been given, afford no basis for attack.[8]

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[8] We note finally the contention (Pet. 29) that there was misconduct on the part of one of the trial jurors. This allegation was denied by the juror (*ibid.*), and the trial court denied a motion for new trial on this ground after consideration of affidavits on both sides (R. 21, 25). There was no outside contact with a juror as in *Remmer* v. *United States*, 347 U.S. 227, and the verdict may not otherwise be impeached by the jurors themselves. *Rakes* v. *United States*, 169 F. 2d 739, 745-746 (C.A. 4).

CONCLUSION

The decision below is correct and presents no question calling for review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1954.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 135

ROBERT MAXWELL WATTS, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATUTES, RULES AND REGULATIONS:

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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No.

ROBERT MAXWELL WATTS, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Robert Maxwell Watts, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the District of Colorado.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 367-372) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1954 (R. 373). An order staying the mandate

of the Court of Appeals to May 16, 1954, was entered on April 23, 1954 (R. 373). On May 10, 1954, an order was entered by Mr. Justice Clark extending the time for the filing of a petition for a writ of certiorari to June 15, 1954. On May 21, 1954, an order was entered by the Court of Appeals staying its mandate until June 15, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. (a) In a criminal tax evasion prosecution, where the defense is in large measure based upon honest mistake, advice of counsel, and lack of fraudulent intent, may the trial court refuse to instruct the jury to return a verdict of not guilty if they believe that items assertedly omitted from income were excluded because of a bona fide misconception of law?

(b) In such a case, may the trial court refuse to instruct the jury to return a verdict of not guilty if they find that at the time of filing the questioned return the defendant believed the return to be true or did not know it was false or did not know an additional tax was due and owing?

(c) In such a case, may the trial court instruct the jury, contrary to the instructions requested, that if the jury finds an understatement of income they can "infer, if the amount is large and substantial, that he [the defendant] knew or must have known that he was understating his income."?

2. (a) In a criminal tax evasion prosecution, where the defense is in large measure based upon the contention that the defendant attempted to and did in fact compensate for any omissions of income by understating his deductions so that in fact no additional tax was due, may the trial court refuse to instruct the jury that in order to convict the defendant the Government must prove that

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some tax in addition to what the defendant had already paid is due and owing?

(b) In such a case, may the court instruct the jury that if they find that the defendant did not report a substantial amount of income received, they are required to find as a matter of law that there is an additional amount of tax due and owing the United States?

3. (a) In a criminal tax evasion prosecution based in part on net worth computations, is the Government required to definitely establish the defendant's opening net worth?

(b) In such a case, may the court shift to the defendant either the burden of establishing his opening net worth or the burden of establishing whether or not asserted increases in net worth are derived from taxable income?

4. (a) Where the evidence unequivocally establishes and the prosecution explicitly states that an item of property received by the defendant in an earlier year was received in consideration of services rendered and was taxable, though not reported, in the earlier year, may the trial court, in a criminal tax evasion prosecution, instruct the jury that they can find that the initial value of the property is taxable in a subsequent year in which the property is sold?

(b) Where a taxpayer erroneously deducts the cost of constructing a house, such cost in fact being a capital expenditure, is the taxpayer thereby precluded from capitalizing the cost for the purpose of computing gain in a subsequent year in which the property is sold?

(c) May the court compensate for an understatement of income or an improper deduction in an earlier year by permitting the jury to consider the item as income in a subsequent year in which the taxpayer is charged with tax evasion?

5. Where the trial court specifically calls to the jury's attention the fact of defendant's indictment, may the court refuse to instruct the jury that the indictment is a mere accusation and is not in and of itself any evidence of guilt?

6. In a criminal tax evasion prosecution based entirely on circumstantial evidence, may the trial court refuse to give the jury any instruction whatsoever to the effect that the defendant must be acquitted if the proof is not such as to exclude every reasonable hypothesis other than that of guilt?

7. May the trial court refuse to instruct the jury upon the section of the statute which forms the basis of the indictment?

8. May the trial court instruct the jury that the reasonable doubt which would require a verdict of acquittal in a criminal case is the "kind of doubt" which the jury "*would be willing to act upon* in the[ir] more important affairs", as distinguished from an instruction to the effect that the doubt must be of a kind which would lead the jury *to hesitate to act or refrain from acting?*

STATUTES INVOLVED

Internal Revenue Code:
Sec. 145 (b). Penalties.

> *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (26 U. S. C. 1946 ed., Sec. 145 (b)).

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STATEMENT

The facts, insofar as they are relevant to the issues raised in this petition, are as follows: Petitioner, a contractor and builder in the Cities of Pueblo and Craig, Colorado, was convicted of violating Section 145 (b) of the Internal Revenue Code under an indictment charging him with willfully and knowingly attempting to defeat and evade income taxes for the year 1946 by filing a false return stating his income to be $3,116.69 and his tax $404.38, whereas his income was $27,850.81 and his tax $10,704.12 (R. 6, 8, 142). The Government took the position, introducing evidence in support thereof, that the petitioner had neglected to reflect several taxable transactions on his income tax return (R. 129-132). The Court of Appeals stated that "Without analyzing these items in detail, it is sufficient to say that they are of such a nature that many, if not all, constituted income to appellant, depending upon whether the jury believed the Government's version of the evidence or that offered by the appellant." (R. 368).

The largest single item of income asserted to have been omitted related to the receipt by petitioner of 85 shares of stock from the Moffat County State Agency, a corporation, of which petitioner was a substantial stockholder. An obligation of the corporation to petitioner for services previously rendered by petitioner was reduced in the amount of $8,500. upon issuance of the stock (R. 49-50, 154-176). At the time the stock was issued the corporation was heavily in debt and was in fact unable to pay the salaries previously agreed upon for its officers (R. 54-57). The Government's witness on value expressly stated that he was not testifying as to market value (R. 60-62, 124-125, 154-156). Petitioner testified that he did not believe that the stock had any ascertainable value and that both his accountants and an attorney to whom he made full disclosure advised him that the stock was not reportable as income if it had no ascertainable value (R. 55-56, 185-186).

The second largest item involved related to the sale in 1946 of a house described as the 901 Security Street property. In computing his gain petitioner used as a base the sum of $7,003.04, reflecting an initial cost base of $6,000, plus improvements in the amount of $1,003.04 (R. 371). The evidence showed that the petitioner received the property in 1943 from the Pueblo Housing Corporation of which he was a substantial stockholder, in consideration for services rendered (R. 27-28, 30, 44-46). The corporation transferring the property was credited with $6,000. which was previously owed petitioner for his services (R. 44-46, 84). The attorney for the Government stated: "We claim he received this property in 1943. It was income then and it was not reported then or in 1946, the year of sale." (R. 28). The evidence was conflicting and confusing as to whether or not the petitioner, who actually built the house, had deducted any of the construction costs as ordinary deductions in prior years (R. 99-100, 102, 103, 130, 176-177).

With respect to the omission of other items of income, petitioner testified that he realized he had probably omitted specific items of income; that he had no intention of filing a false return; that because of the short period of time remaining between the preparation of the return and the due date he attempted to and did in fact compensate for any omissions of income by deliberately understating his deductions; and that he believed, on the basis of the return filed, he had paid the Government at least as much tax as was due it (R. 134, 148-149). An accountant testified that from an audit of the books, records and cancelled checks of the petitioner, the petitioner had overstated his net taxable income (R. 206).

The Government also attempted to prove an understatement of income on a "net worth" theory. The net worth proof offered by the Government consisted solely of financial statements for the years 1943-1946 filed with a private lending institution (R. 15-16, 19). The statements were admitted over the objection of counsel (R. 16, 138, 163, 168).

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The Government witness testified that he had checked none of the items set forth as assets and liabilities in the statements and he had no knowledge of their correctness (R. 19). Petitioner's unqualified testimony was that there was no correlation between his taxable income and asserted increases shown by the financial statements; that the items on the financial statements did not reflect the cost of the items to him, but rather reflected his view of the current market value; and that therefore they were replete with appreciations in value which had not been realized for income tax purposes (R. 168-171). No evidence was introduced by the Government to establish, apart from the financial statements, the petitioner's opening net worth, or to prove that the asserted increases in net worth shown by the financial statements were in fact not attributable to unrealized appreciation in value, or to other non-taxable sources.

Petitioner requested and the court refused an instruction that the jury should bring in a verdict of not guilty if they believed that the items involved were omitted by petitioner because of a bona fide misconception of law. Petitioner requested and the court refused an instruction that the jury should bring in a verdict of not guilty if they found that petitioner at the time of filing his income tax return believed it to be true or did not know it to be false or did not know an additional tax was due and owing (R. 260). Petitioner requested and the court refused an instruction that willful evasion requires an intentional act or omission as compared to an accidental or inadvertent act and requires a specific intent to conceal an obligation known to exist as compared to a genuine misunderstanding of the requirements of the law (R. 259). Contrary to the requested instructions, the court instructed the jury that if they found an understatement of income they could "infer, if the amount is large and substantial, that he [the defendant] knew or must have known that he was understating his income." (R. 247).

In connection with petitioner's testimony that he had deliberately understated his deductions to compensate for omissions of income, petitioner requested the court to instruct that the Government must establish a tax due and owing in excess of that paid by petitioner, although it need not prove all of the income and tax alleged in the indictment (R. 260). The court refused and, on the contrary, instructed the jury that if they found that petitioner did not report a substantial amount of income received, they were required to find, as a matter of law, that there was an additional amount of tax due and owing the Government (R. 246). With respect to the 901 Security Street property, petitioner requested the court to instruct that if the petitioner received the property in 1943, its receipt was not income in 1946 and must not be considered by the jury for that purpose (R. 263). The court refused, and instructed the jury that if they found that petitioner claimed the cost of building the house as a deduction in an earlier year "as a matter of law he had no cost in the house, or any other basis, and .... the entire value of the house was profit under the income tax law . . ." (R. 249).

With respect to the net worth proof offered by the Government, the court instructed the jury, over an objection, as follows (R. 247):

> ". . . the government claims that if he, during that time, made purchases, spent money, and that sum of money which he spent is substantially in excess of what he reported on his income tax return, and *that that money is not shown to have been inherited or received by him by way of a gift, it is reasonable to infer that he derived the money from earnings, from income,* and if that sum of money is substantially in a sum larger than the amount he had been reporting on his income tax return you, ladies and gentlemen of the jury, are entitled to take that into account.
>
> *"You may infer that the money was income that he didn't report, and you may infer, if the amount is large and substantial, that he knew or must have known that he was understating his income."* (Emphasis added).

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The trial court further while calling the jury's attention to the fact of the indictment, refused to instruct the jury that the indictment was a mere accusation and was no evidence of guilt in and of itself (R. 257). It refused to instruct the jury on the statute which formed the basis of the indictment (R. 259). It refused to instruct the jury that where a criminal case is based upon circumstantial evidence, the evidence must be inconsistent with every reasonable hypothesis other than that of guilt (R. 260-261). It refused to grant petitioner's request for a standard instruction on burden of proof and instructed the jury in this respect in a manner objected to by petitioner (R. 258, 250, Petition, page 21).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals sustaining the conviction of the petitioner under Section 145 (b) of the Internal Revenue Code raises several questions of substantial importance, particularly in the prosecution of tax evasion cases, and is in conflict or inconsistent in principle with numerous decisions of other Courts of Appeals as well as decisions of this Court.

1. The decisions below, insofar as they effectively eliminated the issue of "intent" from a prosecution under Section 145 (b), are squarely in conflict or totally inconsistent in principle with decisions of the United States Courts of Appeals for the Third, Fourth, Fifth, Sixth and Tenth Circuits. *United States* v. *Martell*, 199 F. 2d 670 (CA 3); *Stinnett* v. *United States*, 173 F. 2d 129 (CA 4); *Jones* v. *United States*, 164 F. 2d 398 (CA 5); *Wardlaw* v. *United States*, 203 F. 2d 884 (CA 5); *Hargrove* v. *United States*, 67 F. 2d 820 (CA 5); *Lurding* v. *United States*, 179 F. 2d 419 (CA 6); *Haigler* v. *United States*, 172 F. 2d 986 (CA 10). The decisions below are further inconsistent in principle with the decisions of this Court in *United States* v. *Murdock*, 290 U. S. 389 and *Spies* v. *United States*, 317 U. S. 492.

The largest single item of income asserted by the Government in this case to have been improperly omitted related to the receipt by the petitioner of 85 shares of stock of a closely held corporation which the Government contended constituted taxable income in the amount of $8,500.00 upon receipt.[1] The entire theory of the defense with respect to the stock as expressed by the testimony of the petitioner was that he did not report the value of the stock as income because he did not believe the stock had any ascertainable value; and that he further consulted both his accountants and an attorney to whom he made full disclosure and who advised him that the stock was not reportable as income if it did not have an ascertainable market value (R. 155-156, 185-186).

With respect to the remaining items assertedly omitted from income the petitioner freely admitted that he realized when he filed the return that he probably omitted specific items of income. The theory of the defense was, however, that the defendant had no intention of filing a false return; that because of the short period remaining between the time his return was prepared and the time it was due he attempted to and did in fact compensate for any omissions of income by substantially understating his deductions; and that he believed that on the basis of the return filed he had paid the Government at least as much tax as was due it (R. 134, 148-149). Substantial support for the petitioner's testimony was given in the testimony of an expert accountant who testified that from an audit of the books, records and cancelled checks of the petitioner, the petitioner had overstated his net taxable income (R. 206).

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[1] The Government's theory was that an obligation of the corporation for services previously rendered by the petitioner was reduced upon issuance of the stock. The record is clear, however, that at the time the stock was issued the corporation was heavily in debt, and was in fact unable to pay the salaries of its officers (R. 54-57). The witness who testified for the Government as to the value of the stock specifically stated that he was not testifying as to its market value but only as to its book value (R. 60-62, 124-125, 154-156).

Notwithstanding this state of the record and notwithstanding the fact that the defense was critically hinged to the issue of the petitioner's good faith and lack of wrongful intent, the trial court improperly refused to instruct the jury to return a verdict of not guilty if they believed that items were omitted by the petitioner because of a bona fide misconception of law (R. 260). The trial judge further refused to instruct the jury to return a verdict of not guilty if they found that at the time of the questioned return the petitioner believed the return to be true or did not know it was false or did not know an additional tax was due and owing (R. 260). And, consistently, the trial court also refused to instruct that a willful evasion of the tax requires an intentional act or omission as distinguished from an accidental, inadvertent or innocent one and requires a specific wrongful intent to conceal an obligation known to exist as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable (R. 259). Having improperly refused the requested instructions, the trial court proceeded to instruct the jury that if they found an understatement of income they could (R. 247):

> ". . . . infer, if the amount is large and substantial, that he [the defendant] knew or must have known that he was understating his income."

The position of the trial court as sustained by the Court of Appeals is contrary to the principles enunciated by this Court in the *Spies* and *Murdock* cases, *supra*, and by the Courts of Appeals in the numerous cases cited above.

The following statement of the Court of Appeals for the Sixth Circuit in *Lurding* v. *United States*, *supra*, page 422, is particularly apt:

> ". . . . The Court advised the jury that the best evidence of what a person intended to do by an act is the act itself. Undoubtedly this generalization in many contextual environments is sound. Standing

> alone, however, it may give rise to misunderstanding in the minds of lay jurors. The act here involved is the filing of an inaccurate return. In the complexity of successive tax laws, many thousands of taxpayers do that innocently. Such filing is unlawful, however, only if made wilfully, with knowledge of its falseness and with intent to evade taxes. *There is no presumption that may be drawn from the act itself—both knowledge and wilfulness must be established by independent proof, direct or circumstantial.*" (Emphasis added).

To the same effect are *Hargrove* v. *United States, United States* v. *Martell,* and *Wardlaw* v. *United States, supra,* all involving reversals of convictions under Section 145 (b) because of erroneous instructions or refusals to instruct on the requirement of intent. Both the *Hargrove* and *Martell* cases, *supra,* reiterate the principle that "a specific wrongful intent to conceal an obligation known to exist" is a prerequisite to a conviction;[2] and this intent, as emphasized by the Court of Appeals in the *Wardlaw* case, *supra,* page 885, "is not inherent in the act itself, but ... must be proved by or clearly inferred from the evidence". In the present case the trial court's position, sustained by the Court of Appeals, with respect to the instructions requested and the instruction actually given on the issue of intent was not only erroneous as a matter of law but served to exclude from the jury's consideration a defense of primary importance. As the Court of Appeals for the Fifth Circuit stated in *Jones* v. *United States, supra,* page 400, in dealing with the same problem and in commenting upon the decision of this Court in the *Spies* case, *supra:*

> ".... the Supreme Court, pointing out with admirable clarity and correctness the nature of the accusation pressed in this case and of the evidence required to establish guilt of it, has left in no doubt the right of a defendant so charged to have his defenses clearly and fairly put."

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[2] *United States* v. *Martell, supra,* page 672.

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2. The decisions below, insofar as they effectively eliminated the requirement of proof of an additional tax due and owing to sustain a conviction under Section 145(b), are in conflict or inconsistent in principle with decisions of the United States Courts of Appeals for the Second, Seventh, and Eighth Circuits in *United States* v. *Schenck*, 126 F. 2d 702 (CA 2); *Tinkoff* v. *United States*, 86 F. 2d 868 (CA 7); *United States* v. *Rosenblum*, 176 F. 2d 321 (CA 7); and *Gleckman* v. *United States*, 80 F. 2d 394 (CA 8). As previously indicated, the defense was in large measure based upon the contention that while the petitioner did receive items of income not reflected in his return, he attempted to and did in fact understate his deductions to compensate for omitted items of income so that there was in fact no tax due in excess of that paid in accordance with the questioned return. The petitioner's testimony to this effect was supported by the expert testimony of an accountant who testified from the books and records of the petitioner that no additional tax was due in excess of that paid by the petitioner (R. 206). In this state of the record the petitioner requested the court to instruct the jury that in order to convict the petitioner the Government must establish "that a tax, in addition to what the defendant has already paid is due and owing . . . although the Government need not prove all of the income and tax alleged in the indictment". (R. 260). The trial court refused to grant the requested charge to which the petitioner was clearly entitled under the decisions recited above. Contrary to the requested instruction the trial court instructed the jury that "the tax follows as a matter of law from a determination of whatever income was earned which should have been reported." (R. 246). The court further instructed the jury as follows (R. 246):

> ". . . . if you find that the defendant had substantial taxable income in the year 1946 which he did not report on his income tax returns, then you will find that there was a substantial amount of tax due to the United States Government for that year . . ."

The effect of the rulings of the trial court as sustained by the Court of Appeals was not only to mislead the jury as to the requirement of proof of an additional tax due and owing to sustain a conviction, but further to exclude from the jury's consideration a complete defense, namely, that while the petitioner may have understated his income his deductions were similarly understated so that no tax was due the United States in excess of that paid in accordance with the return. The effect of the court's instructions here when considered with relation to the instructions on intent was to exclude the entire theory of the defense from the jury's consideration.

3. The decisions below, insofar as they relate to the Government's net worth proof, which was based solely on petitioner's financial statements, and to the trial court's instructions imposing upon the petitioner the burden of proving that asserted increases in net worth were not attributable to taxable income, are in conflict or inconsistent in principle with decisions of the United States Courts of Appeals for the Third, Fifth, Seventh, and Ninth Circuits. *United States* v. *Caserta*, 199 F. 2d 905 (CA 3); *Ford* v. *United States*, 210 F. 2d 313 (CA 5); *Bryan* v. *United States*, 175 F. 2d 223 (CA 5); *United States* v. *Fenwick*, 177 F. 2d 488 (CA 7); *Olender* v. *United States*, 210 F. 2d 795 (CA 9); and *United States* v. *Calderon*, 207 F. 2d 277 (CA 9) cert. granted June 7, 1954, 22 L. W. 3321. The importance of these net worth questions has been recognized recently by this Court when on June 7, 1954, it granted certiorari in *Holland* v. *United States*, No. 650; *United States* v. *Calderon*, No. 577; *Smith* v. *United States*, No. 726; and *Friedberg* v. *United States*, No. 510; 22 L. W. 3321; all involving the same fundamental net worth questions. The decisions below violate the fundamental principles enunciated by the Courts of Appeals for the Third, Fifth, Seventh, and Ninth Circuits, *supra*, holding that the Government has the burden of proving with definiteness and by credible evidence (a) the defendant's opening net

worth; (b) the fact that defendant's net worth has increased in the tax year involved; and (c) the fact that such increase in net worth is attributable to taxable income. In the present case the net worth proof offered by the Government consisted solely of financial statements for the years 1943-1946 filed by the petitioner with a private lending institution. The Government's agents admittedly checked none of the items set forth as assets and liabilities on the statements and had no knowledge of the correctness of any of these items (R. 19). The petitioner's unqualified and undisputed testimony was that there was no correlation between his taxable income and the asserted increases shown by the financial statements; that the items on the financial statements did not reflect their cost to him but rather reflected his view of the current market value; and that, therefore, they were replete with appreciations in value which had not been realized for income tax purposes (R. 168-171). No evidence was introduced by the Government to refute this testimony. No evidence was introduced by the Government to prove that the asserted increases shown by the financial statements were in fact not attributable to unrealized appreciation in value, or to other nontaxable sources such as gifts or inheritance. Under these circumstances, it was patent error for the trial court to overrule the objections to the admission of this evidence which were continually pressed during the trial (R. 16, 138, 163, 168). The trial court not only failed to instruct the jury to ignore the net worth evidence, but proceeded to instruct the jury erroneously as follows (R. 247):

> " . . . . the government claims that if he, during that time, made purchases, spent money, and that sum of money which he spent is substantially in excess of what he reported on his income tax return, *and that that money is not shown to have been inherited or received by him by way of a gift, it is reasonable to infer that he derived the money from earnings, from income, and if that sum of money is substantially in a sum larger than the amount he had been report-*

ing on his income tax return you, ladies and gentlemen of the jury, are entitled to take that into account.

"*You may infer that the money was income that he didn't report, and you may infer, if the amount is large and substantial, that he knew or must have known that he was understating his income.*" (Emphasis added).

Thus the trial court compounded its original error of permitting the jury to consider financial statements which proved nothing about taxable income, by imposing upon the petitioner the burden of proving that the asserted increases in his net worth were not attributable to taxable income and by instructing the jury that they might infer that the increases reflected unreported income. The conflict with the principles adhered to in the decisions above is irrefutable. As the Court of Appeals said in *Ford* v. *United States, supra* (page 315):

" . . . . One of the most difficult matters of proof in such cases is to establish a satisfactory starting point at the beginning of the first of the tax periods included in the indictment, that is as applied to the present case, to negative the existence on January 1, 1945, of resources available to the defendant and his wife from which the excessive expenditures might have come. *The Government then has the further burden in such cases of proving that there were no gifts, devices, or other nontaxable income which could have been used for the expenditures, and of proving large cash expenditures within each of the tax years considerably exceeding the taxpayer's accumulated cash resources plus reported income and which expenditures could not be otherwise accounted for than by finding that the taxpayer had received more taxable income than had been reported,* and had willfully and knowingly filed or caused to be filed a false and fraudulent income tax return." (Emphasis added).

While the present petition involves several other questions of great importance, the net worth questions presented

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here are alone of sufficient importance to require this Court's consideration.

4. The decisions below, insofar as they allowed the jury to compensate for an understatement of income or an improper deduction in an earlier year by considering the item as income in a subsequent year in which the taxpayer was charged with tax evasion, are in derogation of the annual accounting concept of the Internal Revenue Code and are in conflict or inconsistent in principle with decisions of the United States Courts of Appeals for the First, Third, Fourth and Eighth Circuits. *Ross* v. *Commissioner of Internal Revenue*, 169 F. 2d 483 (CA 1); *Commissioner of Internal Revenue* v. *Mellon*, 184 F. 2d 157 (CA 3); *Clifton Mfg. Co.* v. *Commissioner of Internal Revenue*, 137 F. 2d 290 (CA 4); *Greenwood Packing Plant* v. *Commissioner of Internal Revenue*, 131 F. 2d 787 (CA 4); *Welp* v. *United States*, 201 F. 2d 128 (CA 8). The unequivocal evidence established that in 1943 the petitioner received from the Pueblo Housing Corporation a piece of property described as 901 Security Street in consideration for services rendered (R. 27-28, 30, 44, 46). The evidence also unequivocally established that the corporation transferring the house was credited in 1943 with $6,000.00 which was previously owed by it to the defendant (R. 44, 46, 184). The house was thus taxable income in 1943, the year of its receipt by the petitioner, and this was precisely the theory of the prosecution. Thus, the attorney for the Government made the following statement: "We claim he received this property in 1943. It was income then and it was not reported then or in 1946, the year of sale." (R. 28). In this factual context the petitioner requested the court to instruct the jury (R. 263):

> ". . . that if the Pueblo Housing Corporation conveyed the property located at 901 Security Street in the City of Pueblo to the defendant during the year 1943, the receipt of the property was not income during the year 1946, was not reportable as such and must not be considered by you for that purpose."

The instruction was refused (R. 263). That the petitioner, under the annual accounting concept of the federal revenue laws, was entitled to such an instruction is clearly established by the decisions of the Courts of Appeals in the above-cited cases. As the Court of Appeals for the First Circuit in *Ross* v. *Commissioner of Internal Revenue, supra*, stated, page 492:

> ". . . a taxpayer has an affirmative obligation to report any income falling within its scope in his return for the year of such receipt, and that his failure to do so will subject him to such liabilities for interest, penalties, or even criminal prosecutions, as may be appropriate to his case. If this is so, the doctrine does not merely afford a special choice which the Commissioner may, if he sees fit, exercise retroactively against a taxpayer, but a rule of law determining what constitutes taxable income, and as such presumably binding on all parties."[3]

Contrary to and in disregard of the settled rule, the trial court erroneously instructed the jury that if they found that the petitioner claimed the cost of building the house as a deduction in a prior year "as a matter of law he had no cost in the house, or any other basis, and . . . the entire

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[3] The court after rejecting a defense of estoppel by pointing out that "A mere failure to report income is not a representation that such income has in fact not been received", went on to observe, page 496:

> "In sum, we hold that the Tax Court, erred in attributing to 1939 the disputed items of accrued salary, that if these items were constructively received when earned they cannot be treated as income in any later year, that the doctrine of election is inapplicable to the facts of this case, and, in the absence of misstatement of fact, intentional or otherwise, the petitioner cannot be estopped from asserting that the items were taxable only in the years in which constructively received."

To be noted also are the provisions of Section 3801 of the Internal Revenue Code which would permit a readjustment of the petitioner's liability for the earlier year in which there was an erroneous exclusion from income or erroneous deduction.

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value of the house was profit under the income tax law . . ." (R. 249). The Court of Appeals without citation of authority adopted this view, which was in fact wholly wrong under the very same principle of law expressed in the previously cited cases. Construction costs are capital expenditures and not ordinary deductions; and the Government could no more compensate for an erroneous deduction in a prior year than it could for an understatement of income. Being capital expenditures, the construction costs formed part of the petitioner's base whether or not he erroneously deducted any such costs in a prior year. The law on this precise point is well summed up in *Mertens' Law of Federal Income Taxation*, Vol. 4, Section 23.26, page 31, where the author states:

> "CAPITALIZATION OF ASSETS PREVIOUSLY ERRONEOUSLY CHARGED OFF AS EXPENSE. If, by reason of inadvertance or irregular accounting practices, capital investments have been charged off as expense items, they may be restored and depreciation allowed on such capital investment. It has been said:
>
> > 'The mere failure of a taxpayer to take the proper deduction in each year does not permit him to take advantage of his mistake through an incorrect return in a later year nor does it permit the Commissioner to compel an incorrect return. The law does not contemplate the adjustment in any part of an incorrectly computed tax by the incorrect computation of another tax. . . .'"

5. The decision of the Court of Appeals in sustaining the trial court's refusal to instruct the jury that the indictment was a mere accusation and was not evidence of guilt is squarely in conflict with decisions of the United States Courts of Appeals for the Third, Fifth, and Eighth Circuits. *United States* v. *Schanerman*, 150 F. 2d 941 (CA 3); *Gold* v. *United States*, 102 F. 2d 350 (CA 3); *Patterson* v. *United States*, 183 F. 2d 687 (CA 5), cert. denied 343 U. S. 951; *Cooper* v. *United States*, 9 F. 2d 216 (CA 8); *Nanfito*

v. *United States,* 20 F. 2d 376 (CA 8). Nor is there any merit whatsoever in the suggestion of the Court of Appeals that the need for such an instruction can be obviated by an instruction on burden of proof or presumption of innocence. An instruction relating to the requirement that the Government adduce evidence which convinces the jury beyond a reasonable doubt or to the presumption that a man is innocent until such evidence is produced has no bearing on the question as to whether or not an indictment may be considered as evidence by the jury. Nor can any support be found for the court's position in the decisions of the other Courts of Appeals cited above. Particularly where, as here, the trial court in its instruction calls to the jury's attention the fact that a defendant has been indicted and has been charged with a criminal offense, it is all the more important that the trial court instruct the jury that the indictment has no evidential significance.

6. The decisions below raise, in addition to Question 3, three other important questions (6, 7 and 8) which were raised in *Holland* v. *United States,* No. 650, cert. granted June 7, 1954. These questions which stem from the instructions of the trial judge, who is the same judge who presided in the *Holland* case, are set forth in summary form as follows:

(a) As in the *Holland* case, the decisions below are in conflict with decisions of the Courts of Appeals for the Fifth, Sixth, Seventh, and Eighth Circuits holding or acknowledging the principle that where a criminal case is based entirely upon circumstantial evidence, the trial court is required to give some form of instruction to the general effect that the evidence must be inconsistent with every reasonable hypothesis but that of guilt. *Garst* v. *United States,* 180 Fed. 339, 343 (CA 4); *Stutz* v. *United States,* 47 F. 2d 1029 (CA 5); *Anderson* v. *United States,* 30 F. 2d 485, 487 (CA 5); *Bryan* v. *United States, supra,* page 226; *Strickland* v. *United States,* 155 F. 2d 167, 168 (CA 5);

McLendon v. *United States*, 13 F. 2d 777, 779 (CA 6); *Epstein* v. *United States*, 174 F. 2d 754, 769 (CA 6); *United States* v. *Fenwick*, 177 F. 2d 488, 490 (CA 7); *Gurera* v. *United States*, 40 F. 2d 338, 340 (CA 8); *Banks* v. *United States*, 204 F. 2d 666, 672 (CA 8).

(b) The decisions below are further in conflict with decisions of the Courts of Appeals for the Third and Ninth Circuits holding, contrary to the decision here, that the trial court is required to instruct the jury with respect to the statute governing the offense and not merely as to the factual elements set forth in the indictment. *United States* v. *Pincourt*, 159 F. 2d 917 (CA 3); *United States* v. *Levy*, 153 F. 2d 995 (CA 3); *United States* v. *Noble*, 155 F. 2d 315 (CA 3); *Morris* v. *United States*, 156 F. 2d 525 (CA 9).

(c) The decision below upholding an instruction on reasonable doubt as the "kind of doubt" the jury "*would be willing to act upon* in their more important affairs" (R. 250) is in conflict with every State court appellate decision in which such instruction has been considered. *Commonwealth* v. *Miller*, 139 Pa. 77, 21 Atl. 138; *State* v. *Rover*, 11 Nev. 343; *People* v. *Bemmerly*, 87 Cal. 117, 25 Pac. 266; *Lovett* v. *State*, 30 Fla. 142, 11 So. 550, all to the effect that reasonable doubt is that doubt which would lead reasonable men to *refrain from acting* or *hesitate to act*, rather than the converse set forth in the instructions here.

CONCLUSION

The questions raised in this petition are of great importance in the proper administration of the revenue as well as the criminal laws and they are of particular importance in the proper construction and application of Section 145 (b) of the Internal Revenue Code. Petitioner desires to stress that entirely apart from those questions, particularly the net worth questions, which are common to this case and to other cases in which this Court has recently

granted certiorari, additional questions are here presented of such importance as to independently warrant consideration by this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 135

ROBERT MAXWELL WATTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 367-372) is reported at 212 F. 2d 275.

JURISDICTION

The judgment of the Court of Appeals was entered April 16, 1954. (R. 373.) On May 10, 1954, Mr. Justice Clark signed an order extending the time for filing a petition for a writ of certiorari to June 15, 1954. The petition was filed June 14, 1954. The jurisdiction of this Court is invoked

under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the trial court instructed the jury properly on the necessity of finding wilfulness.

2. Whether, under the circumstances of this case, it was proper to instruct the jury that, if they found a substantial understatement of taxable income, an additional tax would follow as a matter of law.

3. Whether the Government's net worth computation, which simply corroborated the amount of unreported income established by proof of specific items, was properly admitted in evidence.

4. Whether the specific instruction concerning the amount of capital gain on the house at 901 Security Street was correct in the light of the evidence and the theory of the defense at the trial.

5. Whether the trial court erred in not instructing the jury specifically that the indictment was not evidence of guilt.

6. (a) Whether the trial court should have given a specifically requested instruction on the nature of circumstantial evidence.

(b) Whether the jury were sufficiently instructed as to the essential elements of the offense.

(c) Whether the instruction on reasonable doubt was erroneous.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 145.)

STATEMENT

On February 11, 1953, an indictment was filed in the United States District Court for the District of Colorado charging petitioner with a wilful attempt to evade and defeat part of his income taxes for the year 1946, in violation of Section 145(b) of the Internal Revenue Code. It was alleged that petitioner filed a fraudulent return stating his net taxable income to be $3,116.69 on which a tax

of $404.38 was due, whereas he knew that his income was $27,850.81 and his tax, $10,704.12. (R. 6-7.) After a jury trial, petitioner was found guilty as charged (R. 8), and on June 29, 1953, he was sentenced to imprisonment for two years and fined $5,000 (R. 8-9). The Court of Appeals affirmed the conviction. (R. 373.)

The evidence at the trial may be summarized as follows:

Petitioner is a building contractor. (R. 100, 141-142.) He carried on a large part of his business activities through two corporations, the Pueblo Housing Corporation of Pueblo, Colorado, and the Moffat County State Agency Company of Craig, Colorado, in each of which he owned approximately half the stock. (R. 43-45, 47-49.) In addition, he built houses for the corporations in his individual capacity. (R. 46-48.) Possessing a college degree, he showed himself thoroughly familiar with his books. (R. 132, 142.) He kept his own records and those of the corporations, and he prepared his own income tax returns. (R. 43, 47, 92, 95-96, 142-148.) The returns were prepared on a cash basis. (R. 65, 99.)

When Revenue Agent Dempsey began an audit of the 1946 return, he asked petitioner for all pertinent books and records. (R. 64, 87.) Petitioner produced two check registers, the one recording receipts and expenses in connection with his business dealings in Craig, the other containing similar records for Pueblo. (R. 64-65.) Explaining

that the figures in the 1946 return were taken from these two check registers, he also produced a work sheet (Govt. Ex. 32) on which he had assembled the receipts and expenses from the check registers. (R. 64-65, 73-74, 87, 307.) The agent spent three or four weeks examining the records and his questions ultimately brought to light the existence of two additional books of account, a ledger for Pueblo business, and a ledger for Craig business. (R. 67, 69, 229-231.) A number of specific instances were discovered in which petitioner had received income but had not reported it in his return. In some instances the item, although recorded in one of the check registers as a receipt, had been omitted from the summary in the work sheet. In others, items recorded in the ledgers did not appear in either of the check registers or in the work sheet. In one instance, petitioner had reduced his capital gain on a house (901 Security Street in Pueblo) by offsetting expenses which he had already claimed as a deduction in a prior year. (R. 66-74, 85-86.) The total of the omitted items of income was in the neighborhood of $25,000. (R. 130-132.)

Many of these omitted items were entered in the check registers or ledgers in such a manner as to make it exceedingly difficult to determine that they were actually income. (cf. R. 214-216.) For example, payments amounting to $3,000 received from the Pueblo Housing Corporation, although recorded in the proper check register, had been omitted from the work sheet and had been entered in the Pueblo ledger as repayments of debenture

bonds. In reality, they were payments for construction work. (R. 44-45, 66, 68-69.) Again, petitioner bought a Dodge automobile from one Duncan for $1,433.07. He had Morgan and Terrill, for whom he was doing construction work, write a check in this amount payable to Duncan. He then entered the transaction as a $1,500 credit to Morgan and Terrill, but in the Craig ledger only, and in such a manner that it could not be identified as income without further explanation. (R. 31-38, 70-71.) In another instance, the Moffat County State Agency Company owed petitioner about $12,711.39 under construction contracts. The corporation assumed a debt which petitioner owed to Bieser, an associate in that enterprise, and credited itself with a $4,000 payment on his construction account. About the same time the corporation issued 85 shares of its stock to petitioner and credited itself with an additional $8,500 payment on the construction account.[1] Petitioner entered those transactions in his Craig ledger, not as income, but simply as changes in assets and liabilities, and they were not reflected in either of the check registers or in the work sheet. (R. 48-52, 58-59, 71-73, 86, 108-114.) There were two or three other instances in which income was similarly recorded. (R. 40-42, 69-70, 106-107, 117, 131-132.)

Petitioner's explanations to the revenue agents

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[1] The corporation had actually assumed debts in the amount of $10,000 owing by petitioner to Bieser, and Bieser also received 85 shares of stock which he paid for by cancelling $8,500 of the assumed debts. (R. 49, 51, 113-114.)

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during the investigation were not consistent. After first stating that his returns were made up from the check registers alone, he later claimed that he had also used the ledgers. (R. 65, 96, 178-179, 231.) He stated that the $3,000 received from the Pueblo Housing Corporation represented a redemption of debenture bonds. Only after the ledger for that company had come to light did he admit that it represented payment for construction work. (R. 66, 68-69, 114-115.) He told the agent that he had received the Dodge automobile from Morgan and Terrill, that he had never obtained a license for it, and that he intended to report it as income when he sold it.[2] Later, he admitted that the car had been purchased from Duncan, but said that he had obtained the money from Morgan and Terrill, because they were slow in paying their bills. Eventually it developed that Morgan and Terrill paid him regularly and promptly, that he had obtained a license shortly after he purchased the car, and that his wife began to use it immediately. (R. 26-27, 70-71, 115-117, 131, 172-173.) When asked to explain why he appeared to use the original cost of the house at 901 Security Street as a base in determining his capital gain on the sale although he had already taken it as a deduction in a previous year, petitioner stated that he built the house as one of a group to be sold to the Pueblo Housing Corporation, that he deducted the costs in prior years as the houses were completed, that he ultimately re-

[2] The car was purchased in 1946. The investigation was conducted in 1950.

tained the house instead of selling it to the corporation, and that he had simply "overlooked" the fact that he had already claimed the cost as a deduction. (R. 67-68, 102-104, 130.) At the trial, as will be seen, his account of this last transaction was somewhat different.

Petitioner's explanation of the manner in which his return for 1946 was prepared is of special interest. Although he had received a month's extension, the return was filled out on the last night. (R. 163.) He told the agent that after he had listed the receipts and expenses of his contracting business on the work sheet (Gov't. Ex. 32, R. 307), the figures showed a loss—$58,270.88 in receipts and $63,930.85 in expenses—and he realized that something was wrong.[3] Consequently, he attempted to reconstruct his closing inventory, and after much erasing and juggling on the work sheet he arrived at a figure of $13,894.35 which, when subtracted from his expenses, and leaving receipts as they were, gave him a net income approximately equal to the amount already reported in his withholding and estimated tax returns.[4] He said that he knew the result was incorrect, but that he felt he was actually reporting more than he had made and intended to file an amended return later. (R. 82-83,

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[3] He was building houses for the Moffat County State Agency Company during 1946 on a contract calling for cost plus ten per cent, and he was making a side profit on the lumber used. (R. 136-137, 236-237.)

[4] The figures in question are circled in ink at the left lower corner of Government Exhibit 32. (R. 307.)

133-134.) He admitted that he had received all the items of income about which he was being questioned, and he admitted that they had not been reported in his return. His explanation was that he did not think the 85 shares of stock in the Moffat County State Agency Company was income, and that he had simply "missed" the other items when preparing his return. (R. 130-132.)

At the trial, however, petitioner gave a different explanation of what happened when he prepared the return. He denied that the figures at the bottom of the work sheet represented inventory.[5] (R. 158-162, 175, 178-179.) He testified that, after realizing that the loss indicated by the assembled receipts and expenses on his work sheet could not be correct, he hastily went through his books again and found some items of income that he had missed. Not having time to go back and make corrections, he made a rapid calculation of these items, jotted down the figures at the bottom of the work sheet, arrived at a total of $13,894.35, and then subtracted this from his expenses instead of adding it to the receipts. He testified that practically all the items involved here were included in this figure, with the exception of the 85 shares of Moffat County stock and the capital gain on the house at

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[5] Most of the figures that went to make up the total of $13,984.35 were the same as the inventory figures in the Craig ledger for the close of 1946. Furthermore, petitioner submitted a financial statement to a bank showing substantially the same amount of inventory as of that date. (R. 158-162, 273.)

901 Security Street in Pueblo. (R. 149-150, 176, 177-179, 182-183.) He explained that he had not reported the shares of stock as income because he believed they had no ascertainable market value.[6] (R. 156.) As to the capital gain on the house, while not denying that he had deducted the construction cost in a prior year and admitting that he had never transferred the house to the corporation, he claimed that he had acquired the lot from the corporation in 1943 and that it constituted income to him in that year.[7] (R. 151-152, 176-177, 184-185.)

In addition to the financial statement previously referred to,[8] which summarized petitioner's assets and liabilities as of January 1, 1947, the Government introduced four similar statements dated re-

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[6] There was definite testimony for the Government that these shares had a market value of $8,500 (R. 50-52, 62), and petitioner himself, in the financial statement referred to in the previous footnote, placed a market value of $13,500 on them (R. 114, 275). Petitioner's statement (Pet. 5, 10) that the corporation was heavily in debt is inaccurate. The corporation's only creditors were petitioner and his associate Bieser and these obligations were extinguished by the issuance of stock to them. (R. 58-63, 124-125; and see *supra*, p. 6.)

[7] Corkish, petitioner's associate in the Pueblo corporation, was called as a witness for the Government and testified that petitioner credited the corporation in the amount of $6,000 when he took title to the property. Corkish, however, had posted bond for petitioner pending the trial and later testified in his behalf as a reputation witness. (R. 43-44, 46, 139.) Corporation records which would have shown whether such a credit was granted were not available. (R. 184, 225.) The stamps on the deed indicated that the consideration was only $1,000. (R. 44, 184-185.)

[8] See footnotes 5 and 6, *supra*, pp. 9-10.

spectively, August 17, 1943, March 15, 1944, April 28, 1945, and April 20, 1946. (R. 15, 273-291.) A comparison of the statement of April 20, 1946, with that of January 1, 1947, reveals an increase in net worth of approximately $27,500. This total is slightly less than the sum of the unreported specific items of income (R. 130-132) plus the net income reported by petitioner in his 1946 return. (R. 269).

ARGUMENT

1. Petitioner's first contention (Pet. 2, 9-12) is that his defense to the charge of wilful evasion of taxes was in large measure based upon honest misunderstanding of the law, and that the trial court erred in refusing to grant three requested instructions pertinent to that defense and in so charging the jury as in effect to eliminate the issue of wilful intent. Of the requests, No. 8 would have instructed the jury generally that the element of wilfulness prescribed by Section 145(b) of the Internal Revenue Code (*supra*, p. 3) consists in a wrongful intent to evade a known obligation, as opposed to a genuine misunderstanding of the law (R. 259); and No. 11 applied this principle specifically to *all* the items of income involved (R. 260). The third request, No. 10, was a general direction to the jury to acquit if they found that petitioner was unaware that an additional tax was owing when he filed his 1946 return. (R. 260.) The court's charge (R. 245-250), when read as a whole, adequately defined the element of wilful intent in the

light of the issues raised by the evidence in this case.[9]

The major portion of the charge dealing with wilfulness was as follows (R. 245-246):

> * * * if the Government has here produced evidence which you believe satisfies your minds beyond a reasonable doubt that he knowingly and wilfully omitted items of income on his return in an attempt to defeat and evade collection of his income tax, and if you find as I have indicated that he understated his income substantially, his tax substantially, then you should return a verdict of guilty.
>
> I have used the term "wilfully", ladies and gentlemen of the jury. By "wilfully" I mean with a wrongful intent, for a bad purpose, as distinguished from mere inadvertence, oversight, or mistake. If you are satisfied by the evidence that he knew what he was about, was aware of what he was doing, that he nevertheless went ahead and did it, for the purpose of understating his income, then you may find that what he did was done wilfully.[10]

This instruction was adequate on the subject of "mistake", and the court's omission of petitioner's

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[9] The trial court did not, as petitioner states (Pet. 7, 11), refuse the requested instructions. The court noted in each instance that the request would be covered in substance. (R. 259, 260.) At the conclusion of the charge, the defense objected that its request No. 11 had not been covered, but made no reference to Nos. 8 or 10. (R. 255.)

[10] The charge also refers to intent and wilfulness at several other places. See R. 246, 247, 248.

request No. 11 was justified, particularly in the light of the fact that the theory of the defense at the trial was not, as is now asserted, based almost wholly on mistake in failing to include the challenged items. On the contrary, although petitioner's explanations during the investigation were based on mistakes in that he then stated that he had simply overlooked *most* of the items involved, his testimony at the trial was that they had actually been *included* in the return by the $13,894.35 total which he "plugged" in at the bottom of the work sheet, after realizing, too late to make corrections, that his original summary of receipts was incomplete. (*Supra*, pp. 9-10; see also Pet. 6, 10.) As to the house at 901 Security Street, the position of the defense was that, though the original acquisition had been improperly omitted in 1943, the amount of the capital gain was, as a matter of law, properly reported in 1946 [11] (R. 252-253, 263); it is not now, and was not at the trial, clear that petitioner claims that his treatment of this item resulted from a "mistake" either of law or of fact, rather than simply a different version of the facts. Consequently, there was only one item, the 85 shares of Moffat County stock which petitioner states he believed to be valueless marketwise (R. 156), as to which the defense rested squarely upon a mistake in failing to include. The trial court, was therefore, correct, as the Court of Appeals points out (R. 370-371), in refusing to give request No. 11, in the form

[11] The trial court charged that this item, properly computed, was reportable as capital gain in 1946. R. 248-249. See the opinion below, R. 371-372.

presented, since it incorrectly assumed evidence and contention of mistake as to *all* the omitted items.

But petitioner insists that the trial court effectively eliminated the issue of wilful intent from the jury's consideration by telling them in the course of the charge (R. 247):

> * * * you may infer, if the amount [of understated income] is large and substantial, that he knew or must have known that he was understating his income.

No presumption as to petitioner's intent was imposed by this sentence. It was simply a recognition of a fact which is derived from common experience, *i.e.*, that a business man will not *normally* be unaware of a *large* discrepancy between his actual income and that which he reports in his return. The inference is, of course, rebuttable, and it is only one circumstance pointing toward wilful intent to evade. It is obvious from the context that this must have been the only interpretation which the jury could have put upon the trial court's language. In earlier portions of the charge (quoted above), the trial judge had pointed out that wilful intent was a necessary element of the offense, and properly explained the essential mental state for wilfulness.

Immediately after the sentence of which petitioner now complains the court described other indicia of wilful intent, in addition to the size of the amount understated, such as petitioner's method of keeping his books and his contradictory

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explanations during the investigation. (R. 247-248.) When the charge is read as a whole, the issue of wilful intent will be seen to have been adequately defined, and the determination of that issue was left entirely to the jury unhampered by any rule of presumptive intent.

2. The trial court instructed the jury that an additional tax would follow as a matter of law if they found that petitioner had failed to report all of his taxable income. (R. 246.) Petitioner points out that he testified that no additional tax was due because he had included items of income in his return by means of the "plugged" figure of $13,894.35 which he subtracted from his expenses, and he contends (Pet. 2-3, 13-14) that the instruction in effect deprived him of a complete defense. The argument is without substance.

In the first place, this was not, as petitioner asserts (Pet. 14), a complete defense, for, as we have shown (*supra*, pp. 8-10) and as is clear from the petition itself (Pet. 5-6), it was never claimed that the two largest items in the Government's list of specific unreported receipts, the Moffat County stock and the gain on the house, had been included in the $13,894.35 "plug". With respect to these two items petitioner's fairly consistent position was that for various reasons they did not constitute reportable income.[12] The properly applicable principles and the Government's evidence, on the

[12] He did at one stage admit that the gain on the house should have been reported. (R. 130, 132.) At that point, he thought that it had been "overlooked", but at no time did he claim that it had been included in the $13,894.35.

other hand, indicated that they should have been reported, and, once the jury were persuaded by the Government's evidence, the additional taxes followed as a matter of law. The trial court's instruction on this phase was, therefore, correct.

Furthermore, the present argument seems little more than an elaborate technicality. During the investigation, petitioner had told the agents that the $13,894.35 figure represented inventory, and he admitted that the various specific items of income had not been included in his return. (*Supra*, pp. 8-9.) At the trial, he testified that the "plug" figure *did* include most of the specific items (*supra*, pp. 9-10), and when faced with his previous statement he attempted a completely incredible explanation (R. 158-163). The question before the jury was whether, as petitioner first stated, the "plug" represented inventory and the items of income had been omitted from the return, or whether, as he later claimed, they had been included in the "plug" and thus in the return. Under the circumstances it must have been perfectly clear to the jury that no additional tax was due if the items involved had been included, in any manner whatsoever, in petitioner's return.

3. Petitioner contends (Pet. 3, 14-17) that the Government's evidence of increases in his net worth was inconclusive, and that the trial court's instruction shifted the burden to him to prove that these increases were not attributable to taxable income. But the net worth evidence was only of corroborative importance. The Government's case was based upon proof of specific items of unreported income.

The sum of these items was approximately the same as the net worth increase for 1946. (*Supra*, pp. 10-11.) The central issue at the trial was whether the specific receipts had actually been included in petitioner's return for 1946 or were required to be reported therein. Petitioner, admitting the receipts, claimed that he had included all which represented taxable income for 1946. The evidence contradicting his testimony (*supra*, pp. 4-10) amply justified the conclusion that the explanation was false. What is important here, however, is that the Government's net worth computation simply corroborated that part of the case which petitioner admitted. Petitioner himself points out (Pet. 5-6, 10, 13-14) that had his explanation of the unreported receipts been accepted, it would have followed that he owed no additional taxes for 1946 and could not have been guilty of an unlawful attempt at evasion. This constitutes an acknowledgment of the plain fact that it was not the amount of the receipts, a fact admitted by petitioner and corroborated by the increase in his net worth, but the explanation of his failure to report them, which presented the decisive problem for the jury's determination.[13]

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[13] The four cases upon which petitioner relies (Pet. 14), in which this Court recently granted certiorari, are clearly distinguishable, for in all of them the Government was forced to rely largely upon the net worth method to prove unreported income. *Friedberg* v. *United States*, No. 18; *United States* v. *Calderon*, No. 25; *Holland* v. *United States*, No. 37; *Smith* v. *United States*, No. 52.

Net worth contentions, presented in circumstances comparable to those of the instant case, are raised in *Brown* v. *United States*, No. 133, *Beaty* v. *United States*, No. 209, and *Strauch*

4. With regard to the capital gain on the house at 901 Security Street, petitioner contends (Pet. 3, 17-19) that the jury was instructed to compensate for an understatement of income and an improper deduction in an earlier year by considering the item as income in 1946. The record does not support the contention.

Petitioner built the house in 1942 or 1943 as one of a group which he intended to sell to the Pueblo Housing Corporation. Since he filed his returns on a cash basis he deducted the expense at that time, but he could not, at the trial, recall how much it had cost him. Instead of selling the house to the corporation he kept it himself, and the corporation deeded the lot to him in 1943. (R. 67-68, 99-100, 102-104, 130, 151, 176-177, 185.) Both Corkish (*supra*, p. 10) and petitioner testified that the consideration for the deed was $6,000 (R. 44, 151), but the books of the corporation were missing and we have already indicated that there was considerable evidence to indicate that the actual consideration was only $1,000.[14] When petitioner eventually sold the property (i.e., house and lot) in 1946 for $11,500 he deducted $6,000 as his original cost in determining the amount of his capital gain. (R. 102-104, 151-152.)

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v. *United States*, No. 215, all pending on petitions for writs of certiorari. The Government is also filing briefs in opposition in those cases.

[14] See footnote 7, *supra*, p. 10. In addition, since, as both petitioner and Corkish testified, the fair market value of both house and lot was $6,000, it is hardly likely that the lot alone would have been transferred to petitioner for $6,000. (R. 46, 151.)

In this state of the evidence, the defense requested an instruction that if the jury found that "the property" at 901 Security Street had been conveyed to petitioner during 1943, "the receipt of the property" was not income for the year 1946. (R. 263.) This was obviously incomplete and misleading since all the evidence was that petitioner had always owned the house and had received only the lot. Instead, the court instructed the jury that if petitioner deducted the cost of building the house in his 1942 return, he could not deduct it again in 1946 in determining the amount of his capital gain. (R. 248-249.) The court did not mention the transfer of the lot, but neither did the defense in its objection to this portion of the instruction (R. 252-253). The objection was based on the twice repeated ground, unsupported by any evidence, that "the *house* was transferred" to petitioner in 1943, and that the $6,000 which he allegedly credited to the corporation in return for the *house* constituted income to him in 1943 and should be excluded in 1946. (R. 252-253; emphasis added.) While the court might perhaps have instructed the jury that the price of the lot (as distinguished from the house) represented income in 1943 and could properly be deducted in 1946, petitioner can hardly complain now since his confusing request (R. 263) and objection (R. 252-253) only served to obscure the matter and to concentrate emphasis on the house alone.[15]

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[15] Furthermore, since the evidence strongly indicated that the price of the lot was only $1,000, petitioner's computation of his capital gain was still much less than it should have been.

In this Court, petitioner, in addition to urging, as he did in the trial court, that the alleged $6,000 constituted income in 1943, also argues, for the first time, that he improperly deducted his construction expenses on the house in 1943 whereas they were properly deductible in 1946. Even if this were correct as a matter of law, there was no evidence of the amount of the construction expenses, for, as has been pointed out (*supra*, p. 18), petitioner testified he could not recall what they were. Furthermore, although construction costs are often capital expenditures, they are ordinary business expenditures in the case of a contractor who, like petitioner, is in the business of building houses for sale. Petitioner always reported them as such, as is clear from the testimony (R. 102-104) and from the work sheet on which he assembled his receipts and expenditures in preparing his 1946 return (R. 307-309).

5. It is also urged (Pet. 4, 19-20) that the trial court should have instructed the jury that the indictment was not evidence of guilt as was requested. (R. 257.) We think it clear that, as the Court of Appeals pointed out (R. 369), the failure to give this specific instruction was not prejudicial to petitioner.

6. (a). Upon the assumption that the Government's case was based entirely upon circumstantial evidence, petitioner contends (Pet. 4, 20-21) that the trial court should have instructed the jury, as requested (R. 260-261), that the evidence must be inconsistent with every reasonable hypothesis but

that of guilt. But in this case the Government relied almost entirely upon specific items of unreported income which were proved by direct evidence. A special instruction on the nature of circumstantial evidence was not required under these circumstances. *Campbell* v. *United States*, 47 F. 2d 70, 71 (C.A. 5th); *Herman* v. *United States*, 48 F. 2d 479, 480 (C.A. 5th); *Carnahan* v. *United States*, 35 F. 2d 96, 104 (C.A. 8th), certiorari denied, 281 U. S. 723; Randall, Instructions to Juries, Secs. 226-227; Branson, Instructions to Juries (3d ed., 1936), Sec. 65.

(b). Petitioner argues (Pet. 4, 21) that the trial court should have read to the jury the statute defining the offense involved, as had been requested (R. 259). We think there can be no doubt that the elements of the offense were adequately defined for the jury in the court's own language. (R. 245-246.) This was sufficient. *Morris* v. *United States*, 156 F. 2d 525, 531 (C.A. 9th); *United States* v. *Pincourt*, 159 F. 2d 917, 919 (C.A. 3d).[16]

(c). Finally, petitioner complains (Pet. 4, 21) that the trial court's definition of reasonable doubt was incorrect. But the language used was approved by this Court in *Miles* v. *United States*, 103 U. S. 304, 309.[17]

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[16] This point is similar to one of the issues presented in the petition for certiorari in *Holland* v. *United States*, No. 37, now pending for argument.

[17] See footnote 16, *supra*.

CONCLUSION

We believe the decision below is correct and that the petition should be denied. However, this Court may wish to withhold action pending decision in *Holland* v. *United States*, No. 37, in view of the similarity of two of the minor points raised, *supra*, p. 21, to issues in the *Holland* case.

Respectfully submitted,

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AUGUST, 1954.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1954

No. 209

KEITH M. BEATY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term 1954

No.

KEITH M. BEATY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 14, 1954 (App., infra, p. 45, R. 23, Vol. IV), based on an opinion of said Court rendered on June 14, 1954 (App., infra, p. 27, R. 3, Vol. IV) affirming the judgment of the United States District Court for the Western District of North Carolina entered January 25, 1954 (R. 551-2, Vol. I.)*

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (App., infra, p. 27, R. 3, Vol. IV), is not yet reported.

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* The references to the Record (R) herein contained are to Volumes I & IV of Transcript of Record, Appendix of appellant below, and Proceedings in the Court of Appeals, duly certified.

The references to Minutes of Trial refer to pages of the 8 volume record consisting of the original record filed in the Court of Appeals and certified to this Court.

JURISDICTION

The opinion was promulgated on June 14, 1954 (App., infra, p. 27, R. 3, Vol. IV) and the judgment of the Court below was entered on June 14, 1954 (App., infra, p. 45, R. 23, Vol. IV). An order for stay of mandate was entered by the Court of Appeals on June 17, 1954 (R. 23, Vol. IV). The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 United States Code.

QUESTIONS PRESENTED

1. Did the trial court depart from the accepted and usual course of judicial proceedings and deprive the petitioner of his constitutional right to a fair and impartial trial by jury by admonishing and warning the jury that they might be watched by some agency and "amenable to punishment for having desecrated the oath of your office"? (App., infra. p. 49, Minutes of Trial pp. 53 & 54)

2. Did the District Court err, by permitting the respondent over the objection of petitioner, to exhibit to the jury charts and computations of government agents not introduced in evidence and admittedly prepared before the trial and not based upon the testimony adduced during the trial?

3. Did the trial court err by permitting the government agents, over the objection of petitioner, to testify and present their conclusions with respect to the aforesaid charts and computations, prepared before the trial and not based upon the evidence offered by the government during the trial?

4. May a criminal conviction based on the expenditures method of determining taxable income be sustained where the government has failed to establish with reasonable certainty the starting point base of its expenditure com-

putation omitting, among other things, a substantial amount of cash ($100,000) shown by the testimony of the government's own witnesses to have been possessed by the taxpayer at the starting point of the government's expenditure computations?

5. May the government shift to the taxpayer the burden of proving the items which should or should not be included at the starting point of the government's expenditure calculation and may the Court require an explanation from the taxpayer as to the reason for his having $100,000 cash on hand at the beginning of the taxable period?

6. May the trial court, in a criminal tax evasion case based on circumstantial evidence, refuse to give the jury any instruction on circumstantial evidence whatever and, after having agreed to give a charge on circumstantial evidence, refuse in the presence of the jury to give such an instruction when again requested to do so by petitioner's counsel?

7. Did the court below err in holding and deciding that the United States District Court for the Western Judicial District of North Carolina had jurisdiction to indict and try the petitioner although his income tax returns were filed at Greensboro, North Carolina at the office of the Collector of Internal Revenue within the jurisdiction of the United States District Court for the Middle Judicial District of North Carolina and the offense charged in the indictment was alleged to have been committed on the dates the income tax returns were filed?

8. Whether the indictment in this case should have been dismissed by the District Court on the ground that the orderly procedure required by law was not followed by the United States Attorney in presenting these cases to the Grand Jury and whether the Grand Jury proceedings were irregular and unlawful because the Attorney General of the United States had not directed that the

cases be presented to the Grand Jury as required by Executive Order No. 6166, Section 5; Section 3740, Title 26 of the United States Code and as provided by Circular Letter No. 2431 dated August 10, 1933 addressed to "All United States Attorneys", issued by the Attorney General of the United States in compliance with said Executive Order.

9. Did the District Court err by departing from the accepted and usual course of judicial proceedings by instructing one juror in the absence of the other eleven as to the propriety of a recomendation for mercy and in promising that he would follow the recommendation?

10. Was petitioner deprived of a substantial right under Rule 30 of the Federal Rules of Criminal Procedure, due to the failure of the trial court to exclude the Jury and allow petitioner's counsel to make objections to the charge of the Court out of the hearing of the Jury?

11. Was the petitioner deprived of a substantial right under Rule 30 of the Federal Rules of Criminal Procedure where prior to the argument to the jury of defendant's counsel the trial court, pursuant to said Rule 30, stated that he would give a certain requested charge and, after argument to the jury changed his mind and refused to give the charge as promised?

STATUTES, EXECUTIVE ORDERS, CIRCULAR LETTERS, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

STATUTES

United States Code, Title 28, Section 1254(1) (App., infra, p. 46).

Internal Revenue Code, Title 26:

Section 145(b) Penalties (App. infra, p. 46).

Section 53(b) To Whom Return Made (App., infra, p. 46).

Section 3740 Authorization to Commence Suit (App., infra, p. 47).

Section 3761 Compromises—(a) Authorization (App., infra, p. 47).

Executive Order

Executive Order No. 6166, Section 5 (promulgated June 10, 1933, 5 U.S.C. 1946 Ed., Section 124-132) (App., infra, p. 47).

Circular Letter

Circular Letter 2431 issued by the Attorney General of the United States pursuant to Executive Order 6166, supra. (App., infra, p. 48).

Constitutional Provisions

Article VI of Amendments to The Constitution of the United States of America (App., infra, p. 48).

Federal Rules of Criminal Procedure

Rule 30, 18 U.S.C.A. following Section 687 (App., infra, p. 48).

Federal Rules of Civil Procedure

Rule 51, 28 U.S.C.A. following Section 723 (App., infra, p. 49).

STATEMENT OF THE CASE

On March 4, 1952 the petitioner was indicted under Section 145(b), 26 U.S.C. in the United States District Court for the Western District of North Carolina, at Charlotte, North Carolina for attempting to defeat and evade a large part of his individual Federal income taxes for the calendar years 1945, 1946 and 1947 (R. 1-4, Vol. I), Case No. 338.

On the same day, the petitioner was indicted as President of Beaty Service Company, Inc. for causing the cor-

poration to attempt to defeat and evade a large part of its corporate income taxes for the fiscal years ended June 30, 1946, 1947 and 1948 (R. 13-16, Vol. I), Case No. 339. As stated by the District Court, this was in reality a charge against the corporation (R. 13, Vol. I).

The District Court denied the right of the United States to join the charges (R. 17, Vol. I) and the United States Attorney elected to try the individual case, No. 338.

Petitioner duly and timely filed motions to dismiss the indictment on the ground that the District Court for the Western District of North Carolina was without jurisdiction and that petitioner was indicted without the direction of the Attorney General as required by Executive Order No. 6166, Section 5, and the Circular Letter of the Attorney General No. 2431, dated August 10, 1933 (R. 4, Vol. I). These motions were denied by the District Court (R. 12, Vol. I).

The office of the United States Collector of Internal Revenue for the District of North Carolina was, during the period involved in this case, and is now located at Greensboro, North Carolina. The office of the said Collector (now known as Director) and the City of Greensboro, North Carolina were and are located within the judicial district of the United States District Court for the Middle District of North Carolina. The office of the Collector and the City of Greensboro are not within the jurisdiction of the District Court of the United States for the Western District of North Carolina where this petitioner was indicted and tried (App., infra, p. 29, R. 5, Vol. IV).

Pursuant to Section 53(b) of the Internal Revenue Code, supra, the petitioner filed his individual Federal income tax returns for the years 1945, 1946 and 1947 with the Collector of Internal Revenue for the District of North Carolina at the Collector's office located at Greens-

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boro, North Carolina, within the judicial district of the United States District Court for the Middle District of North Carolina.

Immediately after the Jury was impaneled the Court warned the Jury that it might be watched "by some agency that had in mind the prime purpose of seeing that a fair verdict" was rendered in the case and that a member of the Jury might be amenable to punishment. (Page 49 Appendix, infra, page 53 minutes of trial.) Thereupon petitioner moved for a mistrial (page 58 minutes of trial) which motion was denied by the District Court.

Beaty Service Company, Inc. was a North Carolina corporation which during the years involved operated a small fleet of taxicabs in Charlotte, North Carolina. The petitioner was President of this corporation.

At the trial of the case respondent substantially relied upon a computation prepared by Special Internal Revenue Agent Cline purporting to show that during the years 1945 and 1946 petitioner expended respectively $32,855.60 and $56,595.67 in excess of his reported receipts. The agent, Cline, admitted under cross-examination that he failed to give petitioner credit in his (the agent's) computations for cash monies that petitioner had on hand at the beginning of the year 1945 (R. 136, Vol. I). This in spite of the fact that the Government's own witnesses, bankers of Charlotte, testified that as of January 1, 1945 petitioner had on hand approximately $100,000 in cash (R. 125, Vol. I). The charts and computations of Cline were shown to the Jury over the objection of counsel for petitioner (R. 132-133, Vol. I) and the Court denied petitioner's motion to strike Cline's testimony (R. 353-354, Vol. I).

The United States also based its case in part on the proposition that Beaty Service Co., Inc. omitted from its books and tax returns monies which allegedly should have

been received by the corporation from the operation of taxicabs and the sale of obsolete or wrecked cabs or automobiles. The respondent attempted to prove these alleged omitted receipts by circumstantial evidence and again attempted to prove by circumstantial evidence that petitioner had received these alleged corporate receipts and diverted them to his own use. The United States contended that the corporation was taxable in full on these alleged omitted receipts (R. 321, Vol. I) and that petitioner, the individual, was also taxable in full on the full amount of these alleged receipts (R. 321, Vol. I).

The Government based its case in this regard on charts, formulas and computations prepared by Revenue Agents Cline and Parrish purporting to show the monies which the corporation would have received if it had operated its fleet of 32 to 34 taxicabs full time. This was pure circumstantial evidence refuted by the testimony of the Government's own witnesses—seventy-eight taxicab drivers who testified that the cabs did not operate full time; that they were wrecked; had to be repaired; that the drivers themselves failed to pay into the company monies due and that the drivers drank, gambled, and did not work regularly or pay regularly (R. 109-111, Vol. I). The attempt of the Government to show that the petitioner received or diverted any of such alleged receipts by the corporation was again pure circumstantial evidence. There was no direct evidence in the case showing that Mr. Beaty received or diverted any monies of the corporation. Government Agent Parrish admitted that no monies were paid Mr. Beaty from the sale of automobiles (R. 145, Vol. I). This testimony of the Government agents was received in evidence over the objection of petitioner's counsel and the Court denied petitioner's motion to strike the testimony of Government Agents Parrish and Cline (R. 353-354, Vol. I).

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The trial court explained his position and stated to the jury, "• • • if someone was stealing from Mr. Beaty, it was his duty to find it out and prosecute them. • • •" (R. 149, Vol. I). We all know that one who is the owner or has to be president of a corporation, that whether anything would be paid directly to him or to someone for him, the corporation would supposedly receive that amount and be chargeable therewith if it was income." (R. 149, Vol. I).

The Government witness Parrish, on cross-examination, admitted that in order to justify the additional net income attributed to this petitioner through the Beaty Service Company, Inc., that taxicabs of the Beaty Service Company, Inc. would have had to operate approximately 100% of the time and that in a period of two years Beaty Service Company would have had to have more cabs than it actually licensed to derive the monies which the Government agents computed as income (R. 177, Vol. I).

The United States further contended that, based on the computations of Government Agents Parrish and Cline, the petitioner underpaid taxes for the years 1945 and 1946 of $13,152.09 and $13,830.72 on the net income of Lancaster Distributing Company, operated by one E. C. Pundt. It was the position of the Government that the petitioner and not Pundt was taxable on the entire income of Lancaster.

Agent Cline admitted that the Government agents gave no credit to petitioner for the income taxes paid by Pundt on the profits of $94,512.08 from the business (R. 137 and 139, Vol. I). Mr. Pundt testified that he did not "kick back" to petitioner any profits or receipts from Lancaster and that he, Pundt, paid the income taxes on the profits of the business from monies which came out of the business (R. 121, Vol. I).

At the outset of the trial respondent was permitted to place before and exhibit to the Jury large placards or charts showing the conclusions and computations of the

Government Agents. The defendant's objections to these charts and computations were overruled by the District Court (R. 132, Vol. I).

At the close of the Government's testimony (R. 354, Vol. I) and again at the close of all the testimony (R. 485, Vol. I) the petitioner moved for judgment of acquittal, which motions were denied by the Court.

Trial of the case was commenced on November 30, 1953. The trial was concluded on the 18th day of December, 1953, on which date, the Jury returned the following verdict: (R. 535, Vol. I) "We of the jury find the defendant guilty as charged on all counts, but we recommend to this Court that due to health condition of Mr. Beaty that mercy be—that we would recommend mercy." Previous to the finding of the jury, one juryman left the jury room (App. 52), came into the Courtroom with permission of the Court, and sought to speak to the Court privately, and then upon being told by the Court that he would have to make a public statement, he said, "I just want to know of the Court if any recommendation can be made because of health condition." The Court replied, "A recommendation is always proper to be made by the jury, and if made by the jury as part of their verdict returned will be adhered to by the Court." (R. 534, Vol. I).

Following the verdict of the jury, the defendant moved for a new trial and for arrest of judgment (R. 537, Vol. I). The defendant also renewed his motions to dismiss the indictment and for judgment of acquittal. The District Court overruled the motion for a new trial and in arrest of judgment and also overruled defendant's renewed motions for the dismissal of the indictment and for judgment of acquittal (R. 543-545, Vol. I).

The judgment of the District Court was that the petitioner be imprisoned for a period of two years on each Count (R. 551, Vol. I), the sentences to run concurrently.

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In addition the petitioner was fined $20,000 and required to pay all costs of the trial (R. 551-2, Vol. I).

The petitioner duly and timely filed an appeal from the judgment of the District Court to the United States Court of Appeals for the Fourth Circuit.

On June 14, 1954, the Court of Appeals rendered an opinion affirming the judgment of the District Court (App., infra, p. 27, R. 3, Vol. IV). Judgment was entered by the Court of Appeals on June 14, 1954 (App., infra, p. 45, R. 23, Vol. IV).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below in approving the warning given by the District Court to the Jury at the very outset of the trial is not in accord with the decision of this Court in *Remmer v. United States,* 347 U.S. 227, 74 S. Ct. 450 (March 8, 1954).

In that case this Court emphasized that a juror "must feel free to exercise his functions" without the F.B.I. or anyone else looking over his shoulder. It was highly prejudicial and in violation of the Constitutional rights of this petitioner to a free and impartial trial by jury for the trial judge to admonish the Jury that they might be watched by some agency and "amenable to punishment for having desecrated the oath of your office". (Appendix, infra, p. 49, Minutes of Trial, pp. 53-4.) We respectfully submit that the sanction by the Court of Appeals of the trial court's departure from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

II.

The decision of the Court of Appeals involves substantial questions of Federal law, particularly vital in criminal tax evasion cases, and is in conflict with a number of decisions of other Courts of Appeal.

(a) The decision of the Court below is in direct conflict with the principles enunciated by the United States Court of Appeals for the Fifth Circuit in *Demetree v. United States*, 207 F. (2d) 892. In that case the Court condemned the practice under which the Government, having little or no direct evidence to offer and endeavoring to prove the case by circumstantial evidence, offers computations and estimates as the basis for a conviction "• • • not upon evidence of facts but upon speculation and theorizing by the Government's witnesses as to what the facts really are • • •".

In the instant case, the respondent was allowed to place before the Jury at the beginning of the trial and over objection of petitioner, charts and computations admittedly prepared before the trial and not based upon evidence adduced during the trial. Government Witness Parrish testified that he did not base his statements on the testimony as it came from the stand and said "no, sir. Those charts were prepared before the trial started" (R. 184, Vol. I).

This squarely distinguished this case from that of *United States v. Johnson*, 319 U.S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546, where the computations admitted into evidence were prepared on the basis of testimony adduced during the trial and from the witness stand.

The decision of the Court below is also in conflict with *Bryan v. United States*, 175 F. (2d) 223 (Fifth Circuit); *United States v. Fenwick*, 177 F. (2d) 488 (Seventh Circuit); *United States v. Michener*, 152 F. (2d) 880, 883 (Third Circuit).

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Please see also *Cooper v. United States,* 9 F. (2d) 216 (C.A. 8); *Continental Casualty Co. v. First National Bank,* 116 F. (2d) 885 (C. A. 5) and 135 A.L.R. 1141.

(b) The decision of the Court of Appeals is in conflict with decisions in four other circuits holding that where the United States attempts to establish an understatement of income by the expenditures method, the net worth method, or both combined, the starting point of the expenditure case or net worth computation must be definitely established. *Bryan v. United States,* supra (C.A. 5); *United States v. Fenwick,* supra, (C.A. 7); *United States v. Calderon,* 207 F. (2d) 377 (C.A. 9); *United States v. Caserta,* 199 F. (2d) 905 (C. A. 3).

In the case at bar the Government substantially relied on the computation and chart of Revenue Agent Cline purporting to show that during the years 1945 and 1946 petitioner expended approximately $89,000 more than he reported in his tax returns as net receipts. On cross-examination, Cline admitted that he failed to give petitioner credit for cash he had on hand as of the beginning of the period, January 1, 1945 (R. 136, Vol. I). This in spite of the fact that the Government's own witnesses, bankers, testified that petitioner had on hand at the beginning of the period, January 1, 1945, approximately $100,000 (R. 125, Vol. I). This is a perfect illustration of the expenditure method of establishing unreported income and also a perfect illustration of the Government's failure to establish definitely the starting point for the expenditure calculations. Here there was not only an absence of starting point evidence but also downright error and disregard for the cash on hand at the starting point.

The Court below stated that no explanation was given as to the cash on hand at the beginning of 1945 (App. infra, p. 40). However, petitioner was not tried for understatement of income for years prior to 1945; he was

under no duty to explain how he had accumulated the money prior to 1945; and this is another illustration of what has come to pass in this type of case, as stated by the Court in *Demetree v. United States*, supra (C.A. 5), as follows:

> "• • • Further and more prejudicial to a defendant, there has grown up a kind of ancillary theory that the government, by introducing proof of deposits, expenditures, etc., having put up what it calls a prima facie case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the government establish his guilt by legal and credible evidence beyond a reasonable doubt. • • •"

On June 7, 1954, this Court granted petitions for writs of certiorari in the following cases, involving the same or similar points as are here under consideration:

Holland v. United States (C.A. 10) 209 F. (2d) 516 No. 37);

United States v. Calderon (C.A. 9) 207 F. (2d) 377 No. 25);

Smith v. United States (C.A. 1) 210 F. (2d) 496 (No. 52);

This Court also on June 7, 1954 vacated previous orders denying certiorari in *Friedberg v. United States* (C.A. 6) 207 F. (2d) 777, decided October 16, 1953 (now renumbered 18); *Goldbaum v. United States* (C. A. 9) 204 F. (2d) 74; *Banks v. United States* (C.A. 8) 204 F. (2d) 666 and *McFee v. United States* (C. A. 9) 206 F. (2d) 872. These cases also involve similar points.

Holland v. United States, supra, is strikingly similar to the instant case because the government based its case on the expenditures of the taxpayer and failed to include as of the beginning of the period involved a $113,000 cash fund claimed by the taxpayer (pages 6 and 7 of Holland petition).

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In *United States v. Calderon,* supra, the petition for certiorari states that the Calderon case is inconsistent in principle with the holding in *Holland v. United States,* supra (page 9, Government's petition).

(c) The decision of the Court below is in conflict with decisions of the Fifth, Sixth, Seventh and Eighth Circuits, holding or acknowledging the principle that where a criminal case is based on circumstantial evidence, the trial court is required to give some form of instruction to the general effect that the evidence must be inconsistent with every reasonable hypothesis but that of guilt. *Stutz v. United States,* 47 F. (2d) 1029 (C.A. 5); *Anderson v. United States,* 30 F. (2d) 485, 487 (C. A. 5); *Bryan v. United States,* supra, p. 226; *Strickland v. United States,* 155 F. (2d) 167, 168 (C. A. 5); *McLendon v. United States,* 13 F. (2d) 777, 779 (C.A. 6); *Epstein v. United States,* 174 F. (2d) 754, 769 (C.A. 6); *United States v. Fenwick,* 177 F. (2d) 488, 490 (C.A. 7); *Gurera v. United States,* 40 F. (2d) 338, 340 (C. A. 8); *Banks v. United States,* 204 F. (2d) 666, 672 (C.A. 8).

The decision of the Court below is inconsistent with its own decision in *Garst v. United States,* 180 F. 339, 342, 343 (C.A. 4).

The petitioner herein requested an instruction on circumstantial evidence (R. 478, Vol. I). The District Court agreed to give an instruction on circumstantial evidence (R. 488-9, Vol. I) but after charging the Jury refused to give any instruction on circumstantial evidence, when again requested to do so by counsel for petitioner (R. 530-1, Vol. I). Proper exception was noted (R. 533-4, Vol. I).

The Court of Appeals pointed out that the District Court had clearly charged on reasonable doubt and thus rendered unnecessary an instruction on circumstantial evidence (App., infra, p. 43). This conclusion of the Court below is squarely in conflict with the decision of the

Sixth Circuit in the recent case of *Hanson v. United States*, 208 F. (2d) 904 wherein the defendant requested a charge on circumstantial evidence in essentially the same language as the request herein. The Sixth Circuit held that the appellant's rights were not sufficiently stated or protected by an instruction on proof of guilt beyond a reasonable doubt and that appellant was entitled to an instruction on circumstantial evidence, citing *Epstein v. United States*, supra and *Hendrey v. United States*, 233 F. 5, 19 (C.A. 6).

The decision of the Court below is also in conflict with *Downie et al. v. Powers* (C.A. 10) 193 F. (2d) 760, 766, involving a change of mind by the Court with respect to giving a requested charge.

The decision of the Court of Appeals is also inconsistent with its own decision in *Lovely v. United States*, 169 F. (2d) 386, 391, holding it error to require counsel to except to request for a charge in the presence of the Jury.

In *Holland v. United States*, supra, (certiorari granted June 7, 1954) one of the substantial points involved was the refusal by the District Court to give an instruction on circumstantial evidence essentially similar to the one requested here and approved in principle by the Sixth Circuit in *Hanson v. United States*, supra.

As has been developed hereinabove, the precise questions here involved have arisen with great frequency as a result of the ever increasing tendency of the Internal Revenue Service and the Department of Justice to resort to the expenditures method or net worth method or a combination of both methods and the use of charts and computations as a basis for tax evasion prosecutions.

III.

The decision of the Court below that the United States District Court for the Western District of North Carolina had jurisdiction is not in accord in principle with the decisions of this Court; is in conflict with the decisions of other circuits and is inconsistent with its own decisions.

The indictment charged in its three counts that the appellant did wilfully and knowingly attempt to defeat and evade a large part of his individual income taxes due and owing to the United States for the calendar years 1945, 1946 and 1947 (R. 2, 3, 4, Vol. I). The dates of the offenses as charged in the three counts were, respectively (R. 2, 3, 4, Vol. I):

1. On or about March 14th, 1946 with respect to the calendar year 1945.

2. On or about March 15th, 1947 with respect to the calendar year 1946.

3. On or about March 14th, 1948 with respect to the calendar year 1947.

These dates were the dates on which the petitioner filed his income tax returns for the calendar years 1945, 1946, and 1947, which returns are alleged in the indictment to be false and fraudulent.

Thus the question is squarely presented as to whether the offenses of attempting to evade, charged in the indictment, were committed at Greensboro, North Carolina, *where the returns were filed, within the jurisdiction of the United States District Court for the Middle District of North Carolina* or at Charlotte, North Carolina, where the appellant lived and within the jurisdiction of the District Court for the Western District of North Carolina, where he was indicted.

In *United States v. Lombardo,* 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897, this Court held that a resident of the State of Washington was guilty of an offense in the City of Washington, District of Columbia, for failing to file with the Commissioner General of Immigration, in the District of Columbia, a statement in writing required by an Act of Congress.

In *Rumely v. McCarthy,* 250 U.S. 283, 39 S. Ct. 483, 486, 63 L. Ed. 983, this Court said:

• • • •

> "It is contended, indeed, that there was no probable cause to believe that the offense charged in the Washington indictment was committed within the District of Columbia, and this upon the ground that appellant was not personally present in the District at the time of the alleged offense, and that he was under no duty to make report there to the Alien Property Custodian. The commissioner, however, found as a matter of fact that the Custodian's office was in the District of Columbia, and as the finding was supported by competent evidence the District Court properly held that it was not reviewable on writ of habeas corpus. That being so, the duty imposed by the statute to make report to the Alien Property Custodian involved the duty to make such report in the District of Columbia, and failure to make it was an offense against the United States committed in that District. United States v. Lombardo, 241 U.S. 73, 76, 36 S. Ct. 508, 60 L. Ed. 897; New York C. & H. R. R. Co. v. United States, 166 F. 267, 269, 92 C.C.A. 331."

• • • •

We believe that the decision of the Court below fails to follow the above decisions by this Court.

The decision of the Court of Appeals is in conflict with the following decisions:

Wampler v. Snyder, Marshal (Court of Appeals, D.C.) 62 App. D. C. 215, 66 F. (2d) 195.

United States ex rel Wampler v. Hill, Warden, 8 F. Supp. 469, affirmed 74 F. (2d) 920 (Third Circuit).

In *Wampler v. Snyder, Marshal,* supra, the Court of Appeals for the District of Columbia said:

• • • •

> "The Act provides that the income tax return 'shall be made' to the collector for the district in which is the legal residence of the taxpayer. The office of the Collector, as we have seen, is in the city of Baltimore in the State of Maryland. It is there and nowhere else that the return 'shall be made,' and the mere placing of the return in the mail in Washington city is not a compliance with the statute. The words 'shall be made,' as used in the Statute, are the equivalent of 'shall be filed,' and to file a paper is to deliver it at the place where it is to be lodged and kept. When the mails are utilized for this purpose, the filing takes place upon delivery at the office of the official required to receive it. See United States v. Lombardo (D.C.) 228 F. 980, 982, and cases cited, affirmed 241 U.S. 73, 36 S. Ct. 508, 60 L. Ed. 897."

• • • •

The decision of the court below is inconsistent with its own decisions in the following cases: *Bowles v. United States* (C.A. 4) 73 F. (2d) 772, 774, approving *Wampler v. Snyder, Marshal,* supra, and holding that the offense charged was committed where the filing took place.

In *Reass v. United States* (C. A. 4) 99 F. (2d) 752, the Court below not only reaffirmed its decision in *Bowles v. United States,* supra, but spelled out A. B. C. just what these decisions mean, viz. that the preparation of a return, including the mailing thereof, does not constitute the criminal offense under the statute involved, the crime being committed upon the filing of the return with the Collector.

Shurin v. United States (C. A. 4) 164 F. (2d) 566, 569 again reaffirmed *Bowles v. United States,* supra, reap-

proved the doctrine of *Wampler v. Snyder, Marshal,* and relied on *Reass v. United States,* supra.

We think that the law of the case was correctly stated by the District Court in the *United States v. Aaron* and *United States v. Bridwell,* 117 F. Supp. 952, 954, as follows:

• • • •

> "The same questions arose in a recent case before Judge Darr in the Eastern District of Tennessee. United States v. Lefkoff, 113 F. Supp. 551, 556. Judge Darr states:
>
> " 'The crimes alleged in the indictment follow closely the language of the statute, 26 U.S.C.A., Page 145(b) and consist of a single act which occurred at one place and one time and the offense is to be tried only at the one place even though the preparations may occur elsewhere. Reass v. United States, 4 Cir., 99 F. 2d 752; Shurin v. United States, 4 Cir., 164 F. 2d 566; Eisler v. United States, 84 U.S. App. D.C. 404, 176 F. 2d 21; United States v. Newton, D. C., 68 F. Supp. 1952, affirmed, Newton v. United States, 4 Cir., 162 F. 2d 795.' "

• • • •

This accords with the indictment in this case which charges that the offense of attempting to defeat and evade income taxes was committed on the dates the returns were filed at Greensboro within the Middle District of North Carolina and not at Charlotte, within the Western District of North Carolina.

The Court below relied on *Newton v. United States* (C. A. 4) 162 F. (2d) 795. However, in that case Newton was not the taxpayer. He did not file a return. He was indicted for aiding and abetting in the preparation of a false and fraudulent return. His offense was entirely performed in the District where the return was prepared.

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IV.

The petitioner was not indicted by direction of the Attorney General as required by Executive Order No. 6166, Section 5 (promulgated June 10, 1933, 5 U.S.C. 1946 Ed. Section 124-132); Circular Letter No. 2431 issued by Attorney General pursuant to Executive Order No. 6166, supra; and Section 3740, Title 26 United States Code (App., infra, p. 47). (R. 4, Vol. I, Motion to dismiss, paragraph 3, R. 12, Vol. I motion overruled by Court).

On June 7, 1954 this Court granted the petition for certiorari of Odom Farrell Sullivan, No. 747, October Term, 1953, now renumbered No. 64. The point here at issue was relied upon by the petitioner Sullivan at pages 10 to 12 of his petition filed with this Court.

V.

The Court below approved the action of the District Court in instructing one juror in the absence of the other eleven as to the propriety of a recommendation for mercy and in promising that he would follow the recommendation.

The proceedings which took place between the District Court and one juror are set forth in the Appendix, infra, page 52. (See also R. 534, Vol. I)

The decision of the Court below is in conflict with the recent decision of the Fifth Circuit in *Demetree v. United States*, 207 F. (2d) 892, 895.

It is also inconsistent with the Court of Appeals own decision in *Lovely v. United States*, 169 F. (2d) 386, 391.

Please see also *Ryan v. United States* (C. A. 8) 99 F. (2d) 864 and *Coward v. Commissioner*, 164 Va. 639, 178 S.E. 797.

The Court of Appeals itself stated (App. infra, pp. 44-45)—

> "• • • Undoubtedly communications between the court and the jury should be made in the presence of all the jurors • • •."

We submit that if the jeopardy of the defendant was to be made the subject of a trade or compromise, he was entitled to have all the jurors hear to what the Court had agreed and the eleven jurors should not have had to rely on the version of the agreement as it came from the lips of a juror who was interested enough to attempt to have a private conversation with the trial judge. (App., infra, p. 52, R. 534, Vol. I)

We know not what the lone juror said to the other members of the jury upon his return to the jury room. However we respectfully submit that the colloquy of the trial judge with the one juror was prejudicial to the rights of petitioner and might well have induced the verdict of the jury which obviously was in doubt. We again submit that the sanctioning by the court below of the action of the trial court calls for an exercise of this Court's power of supervision.

VI.

The court below held in substance that under Rule 30 of the Federal Rules of Criminal Procedure (referred to by the court in its opinion as Rule 51 (App., infra, p. 49) petitioner's attorneys were required to request of the trial court that the jury be excluded while petitioner's objections were made to the court's charge.

Every experienced trial lawyer knows that juries are very inquisitive and that they do not like to be excluded from the proceedings in the court room. For defendant's counsel to be required to request at this critical stage of the trial that the Jury be excluded would be highly prejudicial to petitioner's Constitutional right to a fair trial.

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Obviously the drafters of Rule 30 of the Federal Rules of Criminal Procedure had this in mind when they adopted the mandatory provision of Rule 30 that "opportunity shall be given to make the objection out of the hearing of the jury"; and undoubtedly they further had in mind some action by a trial court similar to what actually took place here when the Court said to the jury: "Every lawyer who makes contest for a case and prosecutes or defends is zealous. He desires to win. That is the American way, to win, and being desirous of that fact he becomes zealous; * * *" R. 530-531, Vol. I).

It is respectfully submitted that the provisions of Rule 30 are mandatory; that the trial court should have excluded the Jury without the defendant being required to request such exclusion and that it was highly prejudicial to defendant for the Court to tell the jury that counsel was "zealous" as described hereinabove.

The Fourth Circuit Court of Appeals itself correctly stated the rule in a rape case, *Lovely v. United States,* 196 F. (2d) 386, 391, as follows:

> "Federal Rules of Criminal Procedure, Rule 30, 18 U.S.C.A. following section 687. Ordinarily, failure to observe the requirements of this rule will be held sufficient ground for granting a new trial, unless it affirmatively appears that no prejudice resulted therefrom; for counsel should not be required in the presence of the jury to place themselves in the attitude of apparent antagonism to the trial judge which is involved in excepting to the charge."

The petitioner again respectfully submits that the court below erroneously sanctioned the unusual interpretation by the trial court of the provisions of Rule 30 in an income tax case and the trial court's remarks to the Jury and that this again calls for this Court's power of supervision and the clarification by this Court of Rule 30 as applied to Federal tax cases.

VII.

Rule 30 of the Federal Rules of Criminal Procedure provides "the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, * * *".

Judge Murrah of the Tenth Circuit Court of Appeals in the case of *Downie et al. v. Powers et al.*, 193 F. (2d) 760, 766, considered Rule 51 of the Federal Rules of Civil Procedure which rule contains the identical language above quoted and in substance stated that this rule is too plain for misunderstanding and its purpose was to let counsel know what could or could not be argued to the jury and that where the trial court changes its mind after arguments have been made a new trial should be granted, or at least counsel should be given an opportunity to reargue its case. We submit that this is highly important for the reason that where, as in this case, counsel is told what the trial court will charge (R. 488, Vol. I) and relies on that statement of the trial court, there is no more effective way of reducing counsel's argument to a nullity and of depriving the defendant of a fair trial than for the court, in the presence of the jury, to openly state to counsel for the defendant, as was done in this case, that he refused to give the charge on circumstantial evidence (which he had promised to give (R. 488, Vol. I)) for the reason that this was not a case where a charge on circumstantial evidence was required (R. 530, Vol. I).

Rule 30 being so important, we submit that this Court should use its power of supervision and clarify the meaning of the same.

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CONCLUSION

Petitioner respectfully submits that this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Jacksonville, Florida,
Counsel for Petitioner.

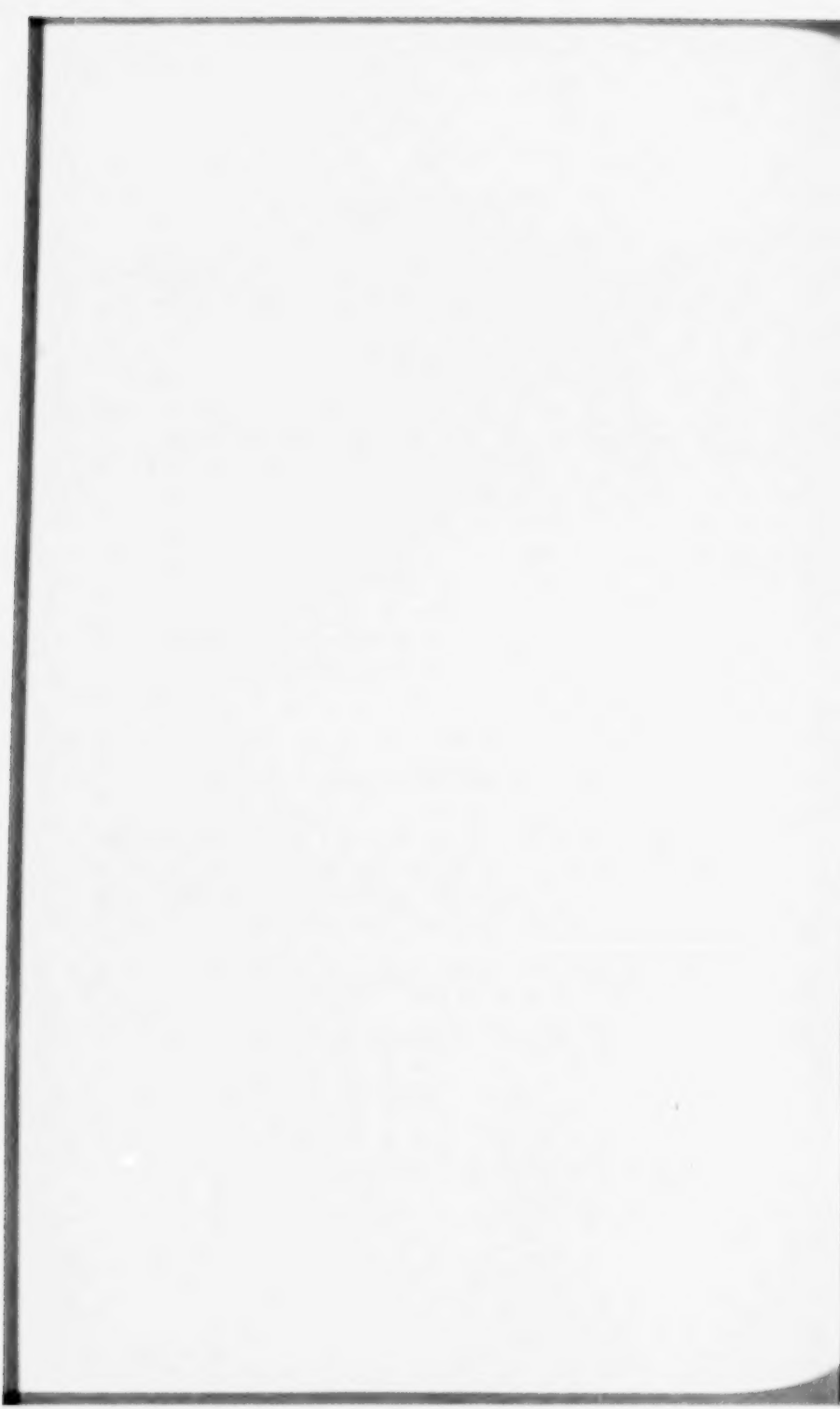
CERTIFICATE

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a writ of certiorari well founded and that it is not interposed for the purpose of delay.

LLEWELLYN A. LUCE

W. M. NICHOLSON

JOHN W. MUSKOFF



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APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6760.

KEITH M. BEATY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE. CRIMINAL.

(Argued June 1, 1954. Decided June 14, 1954.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

John W. Muskoff and Llewellyn A. Luce (W. M. Nicholson on brief) for Appellant, and James M. Baley, Jr., U. S. Attorney, for Appellee.

Soper, Circuit Judge:

Keith M. Beaty was convicted of violating Section 145 (b) of the Internal Revenue Code under an indictment in three counts, of which the first count related to the tax year 1945 and charged that the defendant did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States for that year by maintaining or causing to be maintained false books and records, by concealing assets and covering up sources of income, by preparing or causing to be prepared a false income tax return and by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of North Carolina a false and fraudulent income tax return wherein he stated that his net income for the calendar year was the sum of $48,490.98 and that the amount of tax due thereon was the sum of $24,350.55, whereas as he then and there well knew, his net income for the calendar year was $254,701.83 upon which he owed to the United States an income tax of $209,785.06.

The second and third counts in similar terms charged attempts to defeat and evade the income tax for the years 1946 and 1947 alleging in the second count as to 1946 a false and fraudulent return of income of $75,265.42 and a tax due of $42,526.74, whereas the income was $174,715.24 and the tax due was $125,565.03 for the year; and alleging in the third count as to 1947 a false and fraudulent return of income of $48,283.69 and a tax due of $22,937.04, whereas the income was $86,077.04 and the tax due was $50,960.08.

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The District Judge entered judgment of imprisonment for two years as to each of the counts of the indictment, the sentences to run concurrently and not consecutively. In addition the court imposed a fine of $10,000 on the first count of the indictment, a fine of $5,000 on the second count, and a fine of $5,000 on the third count, the fines to be cumulative, making a total fine of $20,000, in addition to the court costs.

The principal contentions on this appeal are that the court lacked jurisdiction over the offenses charged in the indictment and that the evidence was insufficient to sustain the verdict of the jury. The statute, 26 U.S.C. Int. Rev. Code, Sec. 53(b), requires that the income tax return of an individual shall be made to the collector for the district in which is located the taxpayer's legal residence or principal place of business. Beaty resided and was engaged in several business enterprises in Charlotte, North Carolina, in the Western District of North Carolina, in which the indictment was found and the case was tried; but the office of the Collector (now Director) of Internal Revenue was located in Greensboro, North Carolina, in the Middle District of North Carolina, where the tax returns of the defendant were filed. Hence it is contended that the offenses charged were triable only in the Middle District of North Carolina and the court below was without jurisdiction.

This contention, however, overlooks the fact that the defendant was not indicted for wilfully failing to make returns and pay the taxes in violation of Sec. 145(a), or for making returns which he did not believe to be true and correct as to every material matter, in violation of Section 145(c) of the statute, but for attempting to evade or defeat the payment of the taxes by maintaining false books and records, by concealing assets, and covering up sources of income, and by preparing and filing false and fraudu-

lent income tax returns. It has been held in cases where the charge was confined to an attempt to evade the tax by filing a fraudulent return that the offense was committed where the returns were filed. See the conflicting decisions in *United States* v. *Aaron*, N.D. W.Va., 117 F. Supp. 952, and *United States* v. *Albanese*, S.D. N. Y., 117 F. Supp. 736. The charge in the case at bar, however, includes the making of false records and the concealment of assets, and if any of these acts are proved to have occurred in the Western District of North Carolina, the case is made out and the trial court had jurisdiction.

We have had occasion to consider kindred questions in a number of earlier cases. In *Bowles* v. *United States*, 4 Cir., 73 F. 2d 772, we held that a resident of the District of Columbia, which is part of the Revenue Collection District of Maryland, was triable in the District Court for the District of Maryland for wilful failure to make an income tax return for 1930 and for a wilful attempt to evade the income tax of 1931 by filing a false and fraudulent return. In *Reass* v. *United States*, 4 Cir.,'99 F. 2d 752, we held that a defendant indicted for making a false statement to influence the action of a Federal Home Land Bank in Pittsburg, was triable in Pennsylvania where the statement was presented to the bank, and not in Maryland where the statement was prepared, since the essence of the crime was the act of delivering the statement to the bank. In *Newton* v. *United States*, 4 Cir., 162 F. 2d 795, however, we held that a defendant indicted for aiding in the preparation of a false and fraudulent claim in connection with an amended income tax return was triable in the Western District of Virginia where the claim was prepared, although the claim was filed in the office of the Collector of Internal Revenue in Richmond, in the Eastern District of the State. From the decision in the last mentioned case it appears that the crime there under consideration is committed by any person who "aids" or "as-

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sists in" the preparation of the return, and that the acts performed by the defendant in the preparation of the return took place in the Western District of Virginia. Resting the decision on this phrase Judge Dobie pointed out: (162 F. 2d 796)

> "All federal crimes are statutory, and these crimes are often defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb usually contains the key to the solution of the question: In what district was the crime committed? Without the exact language of the statute, particularly this verb, paraphrases and loose citations in this field are more than inaccurate; they are positively misleading. When, as is so often the case, the statute enumerates several such verbs, only scrupulous, even meticulous, nicety in exact quotation can prevent these statutes, as well as the decisions under them, from proving a snare and a delusion to the unwary."

See also *United States* v. *Johnson*, 319 U.S. 503, 514; *Shurin* v. *United States*, 4 Cir., 164 F. 2d 566. *Cf. United States* v. *United States District Court*, 6 Cir., 209 F. 2d 575.

In *Spies* v. *United States*, 317 U.S. 492, the court held that the wilful failure to make a return and to pay the tax, which are made misdemeanors by Sec. 145(a) of the statute, do not without more constitute attempts to evade or defeat the tax which is made a felony by Sec. 145(b). The court said: (317 U.S. 498, 499)

> "The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law 'attempt.' The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the

attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."*

We reach the conclusion that the District Court had jurisdiction in the case at bar since the prohibitory words of the statute are directed against "any person who wil-

* The court did not comment in this case on Sec. 145(c) of the statute which makes it a felony for an individual to make a return which he does not believe to be true and correct in every material manner.

fully attempts in any manner to evade or defeat any tax imposed by this chapter," and the proof relates to activities of the defendant performed in the Western District of North Carolina.

Beaty Service Company

In proof of the charges that the defendant attempted to evade payment of the income taxes by maintaining false records and covering up sources of income, the Government relies particularly upon the disparity between the income reported and the income received by Beaty in the tax years from the enterprises known as Beaty Service Company and Lancaster Distributing Company. The Beaty Service Company was nominally an incorporated body but there was abundant evidence to show that it was in fact Beaty's individual property. Only three qualifying shares of stock were ever issued, one to Beaty, one to his father and one to his brother. No records of corporate activities as such were kept and no dividends were paid. The father died in 1943 and there was no administration on his estate. The brother invested no money in the business and received none therefrom, except a salary.

The operating records of the business were kept in Beaty's office. The bank deposits were made by him and only such monies as he reported to the bookkeeper were recorded. He only was authorized to draw checks upon the bank account. He put up his own securities as bonds, under which the company operated. The employees received instructions from him alone, the corporate income tax returns were signed by him. Aside from the permissible inference that the corporation was only a name, and that the business belonged to Beaty individually, so that the income therefrom should have been included in his personal return, there was evidence to show that Beaty collected income from the business and did not deposit it in the corporate bank account. Receipts from the enter-

prise consisted of taxicab rentals, bonding fees from cabs owned by individuals who operated under the Beaty bonding system, and proceeds from the sale of automobiles. Taxicab rentals were $10 per day except on Saturdays and Sunday when they were $12 per day, payable at 6 P.M. on each day. During the tax years Beaty operated 32 to 38 cabs. Bonding fees amounted to $7 per week on 20 to 32 additional cabs operated by individual owners. Monies from these sources were placed in envelopes marked with the number of the cabs and delivered to Beaty's office and counted. Beaty made the deposits in the bank at irregular intervals and delivered duplicate deposit slips or the bank book to the bookkeeper so that entries might be made on the corporate books. No record was retained to indicate how much was received from any individual cab or individual driver, and the envelopes and daily check sheets were destroyed. Hence the only record of income was a cash journal made from the record of bank deposits furnished by Beaty, while the expenses were itemized in detail and receipts and documentary proof retained.

The record of the sales of the cars was also found to be defective. Ten sales which were proved to have been made were not recorded at all and 23 cars were reported to have been sold at prices less than the money actually received therefrom.

Under these circumstances the United States sought to prove the receipts of the business by producing 83 taxi drivers as witnesses who testified as well as they could as to the days they worked and the rental and bonding fees which they paid. The government also checked the reports of operations maintained under the local law by the Police Department of the City and produced an account of the true income prepared by tax accountants. This account tended to show that the income actually received by the

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Beaty Service Company or by Beaty, which was not reported either in the corporate or individual tax returns, amounted to $55,103.29 in 1945, $32,461.97 in 1946, and $21,696.85 in 1947, or a total of $109,262.11.

Lancaster Distributing Company.

The story of the Lancaster Distributing Company, which can only be given in broad outline, also gives support to the inference that Beaty received taxable income in 1945 and 1946 which he did not include in his returns. In the summer of 1944 he induced one E. C. Pundt, an auditor who had previously had charge of the books of the Beaty Service Company, and was a trusted friend, to go into the wholesale whiskey business. Pundt was totally inexperienced in this field and lacked financial means but Beaty promised to back him and accordingly Pundt set up the business in Lancaster, South Carolina, in September of that year. He advanced $7500 in cash, $2500 of his own money and $5,000 which he borrowed from one Passons. The first shipment of goods was received on open account from Sol Feldon of Baltimore, an associate of Beaty. Later shipments of substantial size were purchased with funds borrowed from the American Trust Company on collateral furnished in every case by Beaty which at times amounted to as much as $250,000. Beaty himself made numerous trips to New York and Philadelphia to purchase the goods, Pundt remaining in South Carolina except for a few trips to Philadelphia. Beaty had and exercised the right of drawing checks on the bank account.

The testimony of Pundt as to the ownership of the business was in effect that at the outset he was to be the proprietor and Beaty the backer of the enterprise; but it is evident that Beaty was the monied man and exercised actual control from the beginning. This was made clear

by the execution of a document some time after the establishment of the business in September, 1944 and before its subsequent incorporation in March of 1946, wherein it was agreed that Pundt and Passons were to work for the business on a salary basis and Beaty was to have complete control. Pundt's copy of this document was later destroyed but there was no denial of its existence and Pundt himself, during his examination as a witness, declared that it was for some one else to determine the ownership of the business since he did not know whether he was competent to do so himself.

Moreover, on one occasion Beaty told a whiskey man in Baltimore that the business of the Lancaster Distributing Company was his and that Pundt was running it for him. On another occasion Beaty used an indebtedness due by the business to Feldon as a credit on an indebtedness due by Feldon to him. Again in 1946, when Pundt gave a check for $5,000 to the United States in part payment of income taxes due by the business, Beaty undertook to stop payment on the check.

It is manifest that the jury might well have found that the business belonged to Beaty and that the income therefrom was taxable to him. The evidence indicated a business of substantial size in 1944, 1945 and 1946, from which profits covered by tax returns in Pundt's name were derived. Using approximate figures the sales in 1944 amounted to $400,000 and the profits $24,000; in 1945 the sales amounted to $2,000,000 and the profits $93,000; in 1946 (three and a half months) the sales amounted to $1,000,000 and the profits $37,000. The aggregate income taxes paid for these years amounted to approximately $72,000, leaving a deficit in taxes of $5,000. It appears that the profits were allowed to remain in the business and that no money was paid by Pundt to Beaty other than enough to cover his traveling expenses and a salary which

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in amount exceeded the salary paid to either Pundt or Passons. Had these profits been reported as the income of Beaty, his taxes would have been substantially increased and would have exceeded the combined taxes paid in his name and in the name of the business. In 1945 the defendant paid an income tax of $24,350.55 but had he included in his income the profits of the Lancaster Distributing Company, his taxes would have amounted to $94,487.05. The personal return of Pundt for the year 1945 showed taxes of $56,994.41, so that by dividing the income as above indicated, the loss to the government was $13,142.09. The Government suffered a similar loss in the year 1946.

In March, 1946 it was decided to incorporate the business under the same name and the evidence indicates that thereafter the business was unprofitable and the details need not be recited herein. It is sufficient to say that upon incorporation common stock in the sum of $100,000 was subscribed, of which Beaty paid $51,000 in cash and Pundt and Passons $24,500 each, which was borrowed from the American Trust Company on notes endorsed by Beaty. In 1946, when Petrushansky, a Baltimore whiskey dealer, and his auditor came to Charlotte to reconcile an account for merchandise, Beaty gave them to understand that he was the owner of the Lancaster Distributing Company, Inc.

Expert Testimony of Parrish and Cline.

In order to reduce the complicated facts of the Beaty business enterprises to comprehensible form and scope, the government made use of the services of John F. Parrish and R. L. Cline, Treasury Department accountants, and placed them on the stand to explain their investigations and to give their opinion as to the correctness of the defendant's tax returns. It is now objected that Parrish was not qualified as an expert and that it was an invasion

of the province of the jury to allow either accountant to express an opinion as to the meaning of the evidence.

There was no error in allowing Parrish to testify as an expert witness. The defendant raised no objection to his qualifications when he was offered as an expert and if there had been objection, it would have been proper to overrule it, for the witness started as an employee of the Government Accounting Office in 1937, later had three years' experience as an auditor and cost accountant, and after service with the armed services for three and a half years, was appointed Special Agent in the Intelligence Division of the Treasury Department and shortly thereafter was assigned to investigate the defendant's liability under the income tax law. His performances in this case indicate that he knew his business.

Before reaching conclusions in the matter, Parrish carefully examined all the books and records made available to him by the defendant. For example, he studied the books of account and the bank account of the Beaty Service Company, the semi-monthly reports of the business to the Charlotte Police Department signed by Beaty and filed in obedience to a city ordinance, and in the absence of the daily reports of the taxi drivers, which had not been preserved, he interviewed more than one hundred men to ascertain the average rental and bonding fees paid to the company; he also checked the automobile records of the State and the prices paid by the purchasers of the cars. By these means he was able to reconstruct with substantial accuracy the income of the company from these sources and to compare it with the amounts shown on the income tax returns; and in order to make his conclusions easily understood, he prepared charts which were exhibited to the court and jury. The basis of these conclusions was shown by the introduction of the records in evidence and the production on the witness stand of the taxi drivers and car purchasers.

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It does not appear that the charts were formally introduced in evidence, but to all intents and purposes they formed a part of the testimony. They were exhibited to the jury, and at the end of the case were taken by the jury to their room to be examined during their deliberations upon the verdict. It is objected that the charts were shown to the jury before the supporting evidence was introduced, and that it was improper for them to be taken to the jury room at the end of the trial. Doubtless the more regular procedure would have required the introduction of the supporting evidence before the conclusions of the experts were shown; but this evidence was finally made available, and most of it was produced before the cross examination of the witnesses began. The defendant suffered no prejudice by the order in which the testimony was adduced. There was likewise no impropriety in affording the jury an opportunity to examine the charts before rendering their verdict, since the attorney for the defendant himself consented "to putting any and all of the evidence in" and thereupon the charts were taken to the jury room in the presence of the attorney without objection.

All of the facts hereinbefore recited tending to show that the Lancaster Distributing Company before incorporation was the personal property of Beaty and did not belong to Pundt were also put in evidence independently of the testimony of the expert witness.

The witness Cline in 1945 also undertook an investigation of the Beaty business, and pursued much the same course as Parrish. He also demonstrated that in 1945, 1946 and 1947 Beaty made large expenditures in excess of those reported in his tax returns for these years. It is objected that this evidence was devoid of probative effect because the amount of money in Beaty's possession at the beginning of the period was not shown in the evidence and

hence the money expended by him may have been derived from this source. This evidence, however, if not conclusive, was admissible for the light it threw on the defendant's methods of carrying on business. See *Bell* v. *United States*, 4 Cir., 185 F. 2d 302, 310. For example, in 1945 these expenditures included $20,000 deposited as collateral for a loan with the bank; and in the same year the bank released to the defendant $70,000 in cash which had been placed with the bank prior to 1945 as collateral for a note. No explanation is given for such transactions. In 1946 these expenditures amounted to more than $64,000 including more than $10,000 deposited in cash with the broker, and $51,000 in cash deposited in the bank at the time of the incorporation of the Lancaster Distributing Company.

The trial judge was careful to instruct the jury that they were in no sense bound by the expression of opinion by the expert witnesses, although it was based on substantially all of the evidence adduced in the case. The judge at the conclusion of the Parrish testimony, cautioned the jury that the evidence of Parrish was merely his opinion and consisted of a recapitulation of the figures which the Government contended showed the unreported income of the defendant; that the jury were to accept these opinions only if they were satisfied beyond a reasonable doubt that the opinions were predicated on facts testified to in the evidence; and that if the opinions were not supported by the evidence it was the duty of the jury to disregard them and to base their conclusions upon the evidence which they believed to be true. A similar caution was given to the jury with respect to the expert testimony in the charge of the court at the conclusion of the case. The course followed by the court in this case was in accordance with the established rule. In *United States* v. *Johnson*, 319 U.S. 503, the court was confronted with a question which arose under similar circumstances and said: (319 U.S. 519)

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"• • • No issue was withdrawn from the jury. The correctness or credibility of no materials underlying the expert's answers was even remotely foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury. The judge's charge was so clear and correct that no objection was made, though, of course, there were exceptions to the refusal to grant the usual requests for charges that were either redundant or unduly particularized items of testimony. The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumptions of the case. So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules."

Restriction of Cross-Examination

The defendant contends that the judge erred in unduly restricting the cross examination of the Government's expert witness Parrish, and in making improper comments to the jury in so doing. The subject under cross examination at the time that the rulings complained of were made was the investigation that the witness had made of the records kept or filed by the defendant in respect to the operation of the taxicabs of the Beaty Service Company. The purpose was to show that the witness in calculating the time when certain cabs were operating and producing revenue had not made sufficient deductions when the cabs

were idle and undergoing repairs. We have examined the transcript of record and we do not find that the defendant's attorney was prevented from bringing out the facts favorable to his case in this or any other respect. Nor do we find that the judge transgressed his authority in making the comment during the cross examination that the expert could not be blamed for errors in his calculation which were based on records prepared or filed by the defendant.

The cross examination of the witness consumed two and a half days during which he was subjected to a rigorous questioning on every phase of the case. The scope of cross examination is ordinarily discretionary with the trial judge and particularly must this be so when complicated transactions are involved and the cross examination may be drawn out to such an extent as to obscure the object in view. The cross examination of a witness is a matter of right but the trial judge has the power and duty to keep it within a proper limit. We do not find that there was any abuse of this discretion in the pending case. See *Alfred* v. *United States,* 282 U.S. 687, 694; *Bell* v. *United States,* 4 Cir., 185 F. 2d 302, 310; *Beaty* v. *United States,* 4 Cir., 203 Fed. 652, 656; *Garber* v. *United States,* 6 Cir., 145 F. 2d 966, 970; *Pullman Co.* v. *Hall,* 4 Cir., 55 F. 2d 139, 141.

Objections to the Charge in the Presence of the Jury.

The defendant also contends that at the close of the judge's charge his attorneys were required to state their objections to the charge in the presence of the jury in violation of Rule 51 of the Federal Rules of Criminal Procedure, which directs that an opportunity shall be given to counsel to make their objections to the charge in a criminal case out of the hearing of the jury.

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The judge in the pending case, at the end of his charge, inquired whether the attorneys desired any further instructions. The defendant's attorneys suggested that the court had failed to mention certain matters in evidence and had not instructed the jury as to the rules governing circumstantial evidence although he had previously indicated that he would give an instruction on this point. The court thereupon stated that a charge on circumstantial evidence was not required in the case, but made certain additions to the charge. He then inquired again whether the defendant had any additional objections to the charge. At no time did the attorneys for the defendant request that the jury be excluded during the discussion of the charge and they do not now indicate that they were in any way prejudiced by the discussion which took place in the jury's presence. Under these circumstances the failure of the court to exclude the jury did not constitute reversible error.

There was no error in refusing a requested instruction of the defendant on the subject of circumstantial evidence. In the request it was stated that the United States relied in the case upon circumstantial evidence and that if the evidence as to any essential element was circumstantial only, it must be of such a character as to exclude every reasonable hypothesis except that of guilt; and if it was not, the defendant should be acquitted. The instruction as offered was too broad because it implied that the case of the Government was based substantially on circumstantial evidence whereas a great part of the evidence was direct. Moreover, the charge of the court was so clear as to the doctrine of reasonable doubt that the jury could not have been misled by the failure to have a charge expressly directed to evidence circumstantial in character. The judge not only called the attention of the jury to the need to be satisfied beyond a reasonable doubt during the course of the taking of the testimony, but at the end of

the case instructed the jury that the burden was on the Government to prove the case; and that the income taxes due by Beaty during the years 1945, 1946, and 1947, as charged in the indictment, must be shown to have been due by him beyond a reasonable doubt; and that the jury must be satisfied also beyond a reasonable doubt that Beaty wilfully and knowingly attempted to evade his income tax obligations to the United States. We are satisfied that the defendant was given every instruction to which he was entitled.

There was no error in the words of caution addressed to the jury at the beginning of the case when the judge warned the jury not to talk about the case to members of their family or any one else, and that they should bear in mind that they might be watched by some agency that had in mind the prime purpose of seeing that a fair verdict should be rendered. The case was doubtless much in the public eye due to the variety and extent of the activities of the defendant in the community and the actions of the jury during the long trial were necessarily more or less in the public eye. We do not find that there was any prejudice to the defendant in this action.

Nor do we find that there was prejudicial error at the conclusion of the case when the foreman of the jury was permitted to come alone into the court room from the adjoining jury room and to ask of the court whether a recommendation could be made by the jury in favor of the defendant because of the condition of his health. To this the court replied that a recommendation on the part of the jury was always proper and would be considered by the court. This occurrence took place after the jury had the case under consideration for a considerable period of time, and thereafter the jury returned a verdict of guilty with a recommendation of mercy. Undoubtedly communications between the court and the jury should be

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made in the presence of all of the jurors; but it is manifest that the communication of the court to the foreman of the jury in this case was reported by him to his colleagues and that the defendant was in no way prejudiced by the jurors' recommendation, as will appear from the fact that the judgment of the court, insofar as imprisonment is concerned, was limited to two years on each count, to run concurrently.

Affirmed.

JUDGMENT

Filed and Entered June 14, 1954

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6760

Keith M. Beaty, Appellant,

vs.

United States of America, Appellee.

APPEAL FROM the United States District Court for the Western District of North Carolina

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THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 14, 1954.

MORRIS A. SOPER
United States Circuit Judge.

Title 28, United States Code, 1952 Edition:
Section 1254. Courts of Appeals; certiorari; appeal; certified

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; • • •"

Internal Revenue Code, Title 26:
Sec. 145(b). Penalties.

> "Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (26 U.S.C. 1946 ed., Sec. 145 (b))."

Sec. 53 (b).

> "(b) To Whom Return Made.—
> "(1) Individuals.—Returns (other than corporation returns) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland."

• • • •

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Section 3740, Title 26 of the Internal Revenue Code and the United States Code provides:

"AUTHORIZATION TO COMMENCE SUIT.

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced, 53 Stat. 460."

Section 3761, Title 26 of the Internal Revenue Code and the United States Code provides:

"COMPROMISES—(a) AUTHORIZATION.

"The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

Executive Order No. 6166, Section 5 (promulgated June 10, 1933, 5 U.S.C. 1946 Ed., Section 124-132) provides as follows:

"The functions of prosecuting in the courts of the United States claims and demands by and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

"For the exercise of such of his functions as are not transferred to the Department of Justice by the

foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

"Nothing in this section shall be construed to affect the function of an agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense."

Circular Letter No. 2431 issued by the Attorney General pursuant to Executive Order 6166, supra, after quoting part of Section 5 thereof, provides as follows:

"In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted."

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA:

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rules of Criminal Procedure: (18 U.S.C.A. following Section 687)

Rule 30. Instructions. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies

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of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Federal Rules of Civil Procedure: (28 U.S.C.A. following Section 723)

Rule 51.—Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

PROCEEDINGS

(Instructions to Jury)

* * * *

"* * * You know not but what you may be watched by some agency that has in mind the prime purpose of seeing that a fair verdict is rendered in this case. We want everybody to have that, and nothing else and nothing more. Your verdict is to be spoken if and when you have heard all the evidence and you ultimately agree upon what you believe the truth is.

"So, if there would be anyone who would undertake in some way or another to speak to you, you be sure and you be certain that you get his name to the extent that even if you are compelled to take him in possession under your own force and hold him until you are heard, or until you can secure aid to have that individual brought before the Court. Don't you let anyone talk to you. Don't talk to your family or to your wife or to anybody else about the case, for I say to you that you might be watched, and if such should occur, then you, as a member of the jury, likewise would be amenable to punishment for having desecrated the oath of your office."

• • • •

(Minutes of trial, pages 53 and 54.)

PROCEEDINGS

"THE COURT: You have examined all of these records, have you not?

"THE WITNESS: Yes, sir.

"THE COURT: OVERRULED.

"THE WITNESS: From the examination of these records and inquiry of the individual drivers that they listed as operating those taxicabs, that is the determination.

"Q (By Mr. Beaty) Now, Mr. Parrish, did you make a similar determination for the year 1946, with the amounts set out on the chart?

"A Yes, sir. Those were arrived at in the identical way as those explained in the previous year, 1945.

"MR. LUCE: I MOVE TO STRIKE those figures, Your Honor, on this ground, that they are obviously based on hearsay from the drivers unless it is only accepted as his opinion of what is due and nothing more.

"THE COURT: I am letting it go in on the theory that they are based on examination of the various records on which income is alleged to be due and in his opinion

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those amounts were understated in the sum set out there. That is the theory. OVERRULED.

"Q (By Mr. Baley) Now, then, in your opinion, from the examination which you have narrated during the course of your testimony, Mr. Beaty failed to report $142,402.94 for the year 1945?

"A That is correct.

"Q Upon which he owed an additional tax of $125,-629.33?

"A That is correct.

"Q For the year 1946, he failed to report $80,328.17, upon which he owed a tax of $66,774.78.

"MR. NICHOLSON: Your Honor, I OBJECT to the form of that question. He is just testifying. Let the witness tell what is going on up there on that screen.

"THE COURT: He is asking him if those are the figures?

"MR. NICHOLSON: He is repeating before the jury there. I OBJECT to it.

"MR. BALEY: And for the year 1947, Mr. Beaty failed to report additional income of $21,161.12, upon which he owed $15,183.56.

"MR. NICHOLSON: OBJECTION.

"THE COURT: Is that what you would testify to, repeating the question?

"THE WITNESS: Yes, sir.

"THE COURT: All right. It would be best, Mr. Baley, to ask him the questions and let him give the jury the figures, because he, after all, is the one testifying."

• • • •

(Minutes of trial, pages 120, 121, 122.)

(Note: Typographical error in Minutes. Examiner should be spelled "Baley" rather than "Beaty".)

PROCEEDINGS

"THE COURT: If you will, tell the jury to come in, please sir.

"THE MARSHAL: Just the Foreman, sir. The Foreman asked to see you, sir.

"THE COURT: (As the foreman speaks to the Court) It will have to be a public statement.

"FOREMAN CARRIKER: Can any recommendation be made on—

"THE COURT: State that out loud, please sir.

"FOREMAN CARRIKER: I just want to know of the Court if any recommendation can be made because of health conditions.

"THE COURT: A recommendation is always proper to be made by the jury, and if made by the jury as part of their verdict returned will be adhered to by the Court.

"FOREMAN CARRIKER: Thank you, sir.

(Whereupon the Foreman retires to the jury room.)

(R. 534-535.)

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FILED
SEP 16 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 209

KEITH M. BEATY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S REPLY BRIEF

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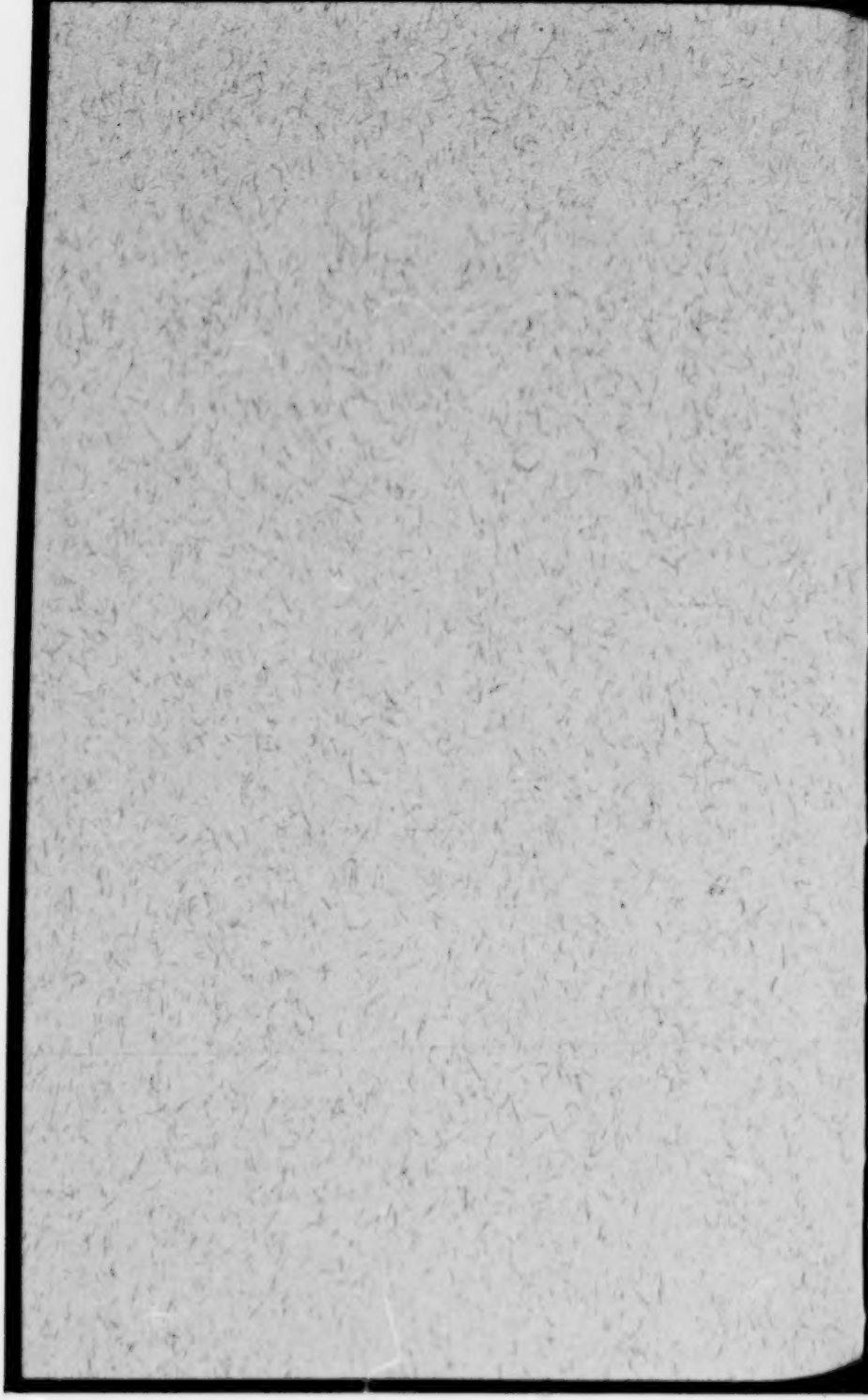

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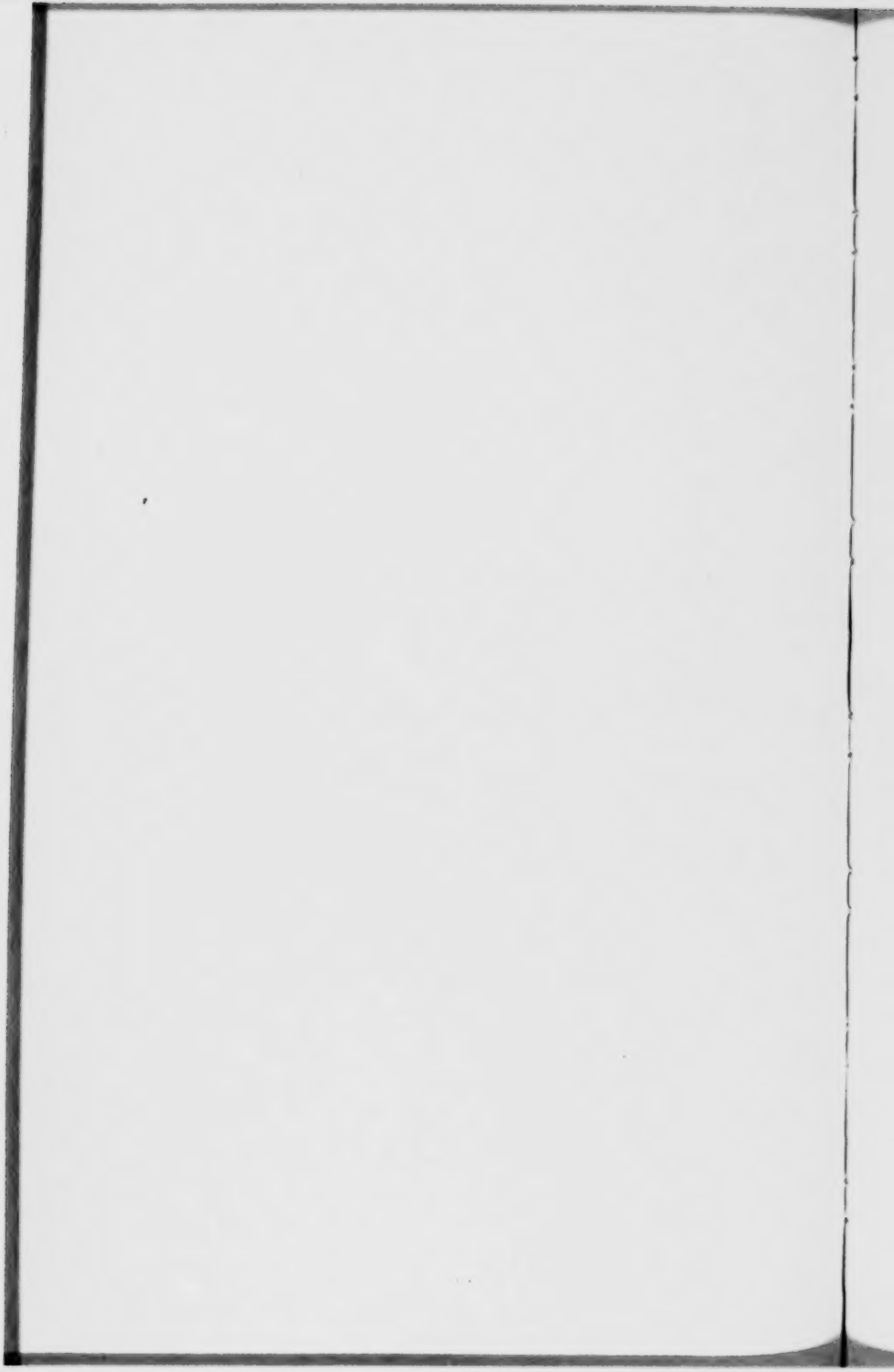

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In The

Supreme Court of the United States

October Term, 1954.

No. 209

Keith M. Beaty, *Petitioner,*

v.

United States of America, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

In reply to the brief for the United States in opposition to certiorari, the petitioner respectfully presents the following for the consideration of the Court:

1.

Under Point 1 of brief in opposition to the petition herein, respondent states (Br. p. 11) that there was no objection by petitioner to the trial court's warning to the

jury which was as follows (Appendix to petition, p. 49, Minutes of Trial, pp. 53-54):

> "• • • *You know not but what you may be watched by some agency* that has in mind the prime purpose of seeing that a fair verdict is rendered in this case.
>
> • • • •
>
> "• • • *for I say to you that you might be watched, and if such should occur, then you, as a member of the jury, likewise would be amenable to punishment for having desecrated the oath of your office.*" (Emphasis ours.)

Respondent's counsel apparently inadvertently overlooked the fact that petitioner not only objected to the use of the above language by the Court, but did so in a most definite way (Minutes of Trial, p. 58 & 59), that is, at the first opportunity and before any other proceedings were had in the case, moved for a mistrial (Minutes of Trial, pp. 58-59). The objection was overruled by the trial court and the motion for a mistrial denied (Minutes of Trial, pp. 58-59). The motion for a mistrial states (Minutes of Trial, p. 58):

> "1. That the statement made by the Court to the jury with reference to jurors being contacted was highly prejudicial to the defendant.
>
> "2. That the facts elicited from the jury did not point to defendant contacting or attempting to contact the jury and statement made by the Court to the jury implied that the defendant or the defendant's friends had so done, which, in the opinion of the defendant is highly prejudicial to the defendant.
>
> "3. That the statement by the Court to the jury that the jury might be or could be or would be watched implied that the Government would watch these jurors, the only purpose being for the Government to watch the jurors was to keep the defendant or his associates from further contacting this juror, or attempting to so do.
>
> "4. That the whole context of the statement could do nothing but lead the jury to believe that the de-

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fendant had done something wrong, was guilty, and will greately influence their verdict."

Counsel for the respondent in commenting on *Remmer v. United States,* 347 U.S. 227, overlooked the main purport of that decision, that is, *"A juror must feel free to exercise its functions wi'hout the F.B.I. or anyone else looking over his shoulder".* We submit that where at the very outset of the trial, the trial court warns the jury that they cannot feel free to exercise their functions without the F.B.I. or someone looking over their shoulders and further actually threatens that it might be done, that the defendant cannot receive a fair trial under the holdings of the *Remmer* case, supra.

2.

The respondent attempts to minimize the importance in this case of computing income by the so-called expenditures method (Br. pp. 13-15), by stating in Respondent's Brief pages 11 and 12 that the issues raised by the group of "net worth" cases [1] now pending before this court are not raised by the record in this case.

Petitioner submits that there was no direct evidence placing in petitioner's hand any unreported income.

Respondent in its brief admits that the computations of its expert illustrated by charts prepared long before the trial only purported to show unreported income in the hands of the corporation (Respondent's Brief, p. 12). The only evidence showing additional income in the hands of the petitioner (according to the government's own expert's admission) was based on items of expenditures in excess of income (R. II, 152). This was circumstantial

[1] ***Friedberg v. United States,* No. 18; *United States v. Calderon,* No. 25; *Holland v. United States,* No. 37; *Smith v. United States,* No. 52.**

evidence which was rendered ineffective by the testimony of the Government witnesses themselves.

Witness Cline testified that he had not given petitioner any credit in his computations for cash on hand as of the beginning of the period, January 1, 1945 (R. I, 136).

Witness Parrish also testified that he had not given petitioner any credit for funds on hand at the beginning of the period (R. I 153-155).

The Government's own witnesses, bankers, testified that petitioner had on hand at the beginning of the period, January 1, 1945, approximately $100,000 (R. I 125). Seventy thousand dollars of this money was released to petitioner by the bank on March 20, 1945 (R. I 129).

Respondent in its brief states: (p. 12)

> "The backbone of the Government's case was the testimony of the taxi drivers and the semi-monthly reports submitted to the City of Charlotte by petitioner showing the number of cabs and the names of the drivers operating in the corporations rental and bonding system. Upon the basis of this direct evidence Agent Parrish submitted a computation, illustrated by charts, showing the amounts of unreported rental and bonding fees received by the corporation."

The reports referred to by respondent were furnished pursuant to a City Ordinance (R. I 351):

> "Such person, firm or corporation desiring to make a cash deposit for other persons shall adopt the trade name to be printed on each of said taxicabs before operation and furnish a list each fifteen days or whenever a change occurs to the Chief of Police and the City Treasurer, giving the name of the owner of the car to be bonded, the make and model of the car, the motor number, the State license number, and the driver of each car on the side of each said car shall be printed under the trade adopted these words

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> 'Bonded by (insert name here)' under Charlotte Taxicab Ordinance. Such list so required and furnished shall be for information only and shall determine the total bond sum to be deposited as provided above."

The Government witness, Cleveland, a taxicab inspector for the City of Charlotte, North Carolina, testified that these reports did not show that the cars reported were in actual operation but only that certain cars were licensed to operate (Minutes of Trial, p. 143), that they were frequently wrecked and sometimes stolen (Minutes of Trial, p. 144). And when your petitioner sought to ascertain by cross examination of the respondent's expert witness, Parrish, just how thorough a research job had been done by him, the trial court would stop petitioner (R. I, 315). We quote the court:

> "THE COURT: An expert only knows what he knows. He does not know what he ought to know. Mr. Muskoff, nobody has the foresight of God Almighty. All in the world this man could know would be the papers he examined, and he is only responsible for that. If it should be shown by something he knows that he is in error, of course the Government is bound by that.
> "MR. MUSKOFF: Are we bound only to show what he knows?
> "(R. 1777) THE COURT: How could he testify to that unless he knows and tell the truth?"

Thus the court will note that the defendant or petitioner was prohibited from ascertaining the correctness or credibility of the materials underlying the expert's testimony.

Therefore, we submit that neither the testimony nor the charts prepared a long time prior to the trial come within the ruling of this Court in the case of

United States v. *Johnson* 319 U.S. 503, 519.

In that case, the defendant was given full right to question the expert's computations. We quote from Mr. Justice Frankfurter's opinion:

"No issue was withdrawn from the jury. *The correctness or credibility of no materials underlying the expert's answers was even remotely* foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury." (Emphasis supplied.)

3.

Under Point 3 of respondent's brief in opposition (Br. p. 16, 17), respondent admits that petitioner was required to file his income tax returns at Greensboro, North Carolina, which is located in the Middle District of North Carolina (Br. p. 16). It is not disputed that he was indicted in the Western District of North Carolina (Br. p. 16). But most important, respondent does not dispute *that the alleged crime of filing a false and fraudulent return was committed at Greensboro, North Carolina, in the office* of the Collector of Internal Revenue.

The indictment (R. 2, 3 and 4, Col. I) charges that the crime was committed on the respective dates of March 14, 1946, March 15, 1947 and March 14, 1948. It is significant that these were the dates upon which the returns were filed. Under the indictment, if any crimes were committed, they were committed on the respective dates of March 14, 1946, March 15, 1947 and March 14, 1948 when the alleged false and fraudulent returns were filed in the Middle District. The maintaining of false books and records and the concealment of assets, as also alleged in the indictment, were *pure evidentiary matters* serving, if anything, *only* to *prove* the alleged *intentionally false character of the return filed.*

In *United States v. Wilbur I. Clark,* United States District Court, Southern District of California, Central Division, Docket No. 23067 (as yet unreported but may be found at Paragraph 72,719, Volume 4, Prentice-Hall 1954 Tax Service) Chief Judge Yankwich recently (August 4, 1954) and incisively observed that concealment of income

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or assets and maintaining false books were the mere "indicia" or "badge of fraud", thus plainly removing such acts as indictable crimes and treating them in their proper category as proof or evidence of crime. Clearly, the jurisdiction of a Federal District Court cannot be bottomed on the locale of the evidence or proof of the crime. Moreover, such acts, (even if true) were performed not on the dates in March when the returns were filed, but long before that time. It is inescapable that the indictment charged the offenses as being committed *when* the returns were filed, thus plainly demonstrating that the indictment itself does not purport to include the alleged acts of concealment and false books as separate offenses upon which jurisdiction might rest. It is therefore, equally inescapable that the only offense charged (the acts of alleged concealment or false records only constituting proof) is that of filing a false return and that act was committed *where* the return was filed, in the Middle District of North Carolina.

Spies v. United States, 317 U.S. 492, heavily relied on by the respondent (Br. p. 17) and by the Court below to uphold the jurisdiction of the District Court for the Western District of North Carolina, did not involve the filing of a false and fraudulent return. That case covered a situation where no return at all was filed. The Petitioner's alleged false return to the Collector is the heart and core of the alleged offense in this case. It is the only crime committed, if any, complete and in itself. It is respectfully urged that the language of the *Spies* case should be generally construed in its application to those situations where non-filing is accompanied by affirmative acts. Conversely, it is respectfully urged that *Spies* is not properly interpreted as applying to a situation where, as here, the indictment charges that the offense committed was the filing of a false return together with other alleged affirmative acts serving only to prove the falsity of the return filed. Otherwise stated, the *Spies*

case has application to and clarifies what is a felonious "nonfiling", but has no import in those cases where "filing" has occurred and the additional acts complained of are not separate and indictable crimes, but merely evidential that a duly filed return is intentionally fraudulent, and that by such fraudulent filing an "attempt" to evade tax has been made.

Certainly, no court would ever permit a conviction under 145(b) as a completed attempt to evade tax where there was a concealing of assets, a concealment of sources of income or a keeping of false accounts *if a taxpayer made a true return of his income to the Sovereign.* Equally certain it is that no court would likely fail to find a violation of Section 145(b) if competent proof is made of concealment of income, assets or other devious conduct, when *the return* of the taxpayer *failed to include such concealed income therein.* In both cases, however, the wilful filing is the crime and no greater illegality accrues to it by a showing that preparation for its commission was made.

Respondent relies on *United States v. Johnson,* 323 U.S. 273 (Br. p. 17) to support the contention that a law should be construed to permit trial of a defendant in his vicinity, if possible. This court in that case observed that "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure, they raise deep issues of public policy in the light of which legislation must be construed." A defendant is, as a matter of Constitutional right, Amendment VI to the Constitution of the United States required to be indicted and tried in the District where the alleged crime is committed. This is no question of convenience or formality. Jurisdiction here is the matter of Constitutional fundamental.

The respondent overlooks one of the essential arguments in the petition, i.e., that there is a diversity of opinion amongst the courts as to what court has jurisdiction of cases arising under Section 145(b) of the Internal

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Revenue Code. This is further emphasized by the recent decision of Judge Chestnut, United States District Court of Maryland, in *United States v. Emmitt R. Warring,* 121 F. Supp. 546, where the question of whether or not the defendant had a right to transfer his case from Maryland, where he was indicted, to the District of Columbia, where he lived and actually prepared and filed with the Deputy Collector's office at Washington, D. C. his income tax return for the year in question. Judge Chestnut, in overruling the motion to transfer, stated as follows:

• • • •

"• • • It is also true that the problem here as to the proper venue is an unusual one arising under the applicable federal statutes. As has been noted, distinction must be made between the judicial district and the collection district. As there are only about 65 collection districts but a much larger number (nearly 100) judicial districts, it seems that possibly one-third of the income taxpayers in Continental United States are required to file their returns with the Collector whose office is in a judicial district outside of the place of their residence in the collection district. United States v. Beard, D.C. Md. (1954) 118 F. Supp. 297. So far as I know it has been the uniform policy and practice of the Department of Justice to prosecute cases like the instant case, arising in other collection districts, by indictment found in the judicial district where the Collector's office is situated although the taxpayer is resident outside of that judicial district but within the area of the prescribed collection district. See also American Bar Association, Section of Taxation, Report of Committee on Procedure in Fraud Cases, 1953, at pp. 111, 112."

• • • •

We again submit that this is a question that should be settled by this Honorable Court.

4.

Respondent, under Point 5 of its brief, states: (Br. pp. 20-21):

> "It is also urged that the court should not have promised to follow the jury's recommendation. But petitioner, instead of objecting to the court's statement, remained silent on the subject just as long as it appeared that he stood to reap some benefit therefrom. He did not object when the statement was made; he did not object when the verdict was returned; he did not raise the point in the motion for a new trial; and he readily cooperated in the physical examination. * * *"

Counsel for respondent apparently overlooked the fact that this question was raised by petitioner in his motion for a new trial (R. I 537-543).

As ground No. 8 in his motion for a new trial petitioner stated (R. I 538):

> "8. The court erred in conferring with one of the jurors about the case in the absence of the other 11 jurors."

As ground No. 29 in his motion for a new trial, petitioner stated (R. I 542):

> "29. The verdict was not the free verdict of the jury, but was arrived at only after a trade or bargaining."

The motion was timely filed on December 22, 1953 (R. I 543) and was argued before the trial court (R. I 543) on January 20, 1954, (Minutes of Trial—p. 2391).

Respondent then proceeds to rely on Rule 30 of the Federal Rules of Criminal Procedure in its attempt to deprive the defendant of the right to raise this serious point and respondent in construing Rule 30 apparently overlooks the fact Rule 30 provides that no party may

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assign as error any portion of a charge or omission unless he objects thereto before the jury retires to consider its verdict. In this case, the jury had already retired and there was no opportunity to object to the additional promise or charge to the jury before they retired. Thus we submit that the case comes within the purview of the "plain error" rule. We submit that the action of the trial court so contrary to the well established principle that private communications, even though harmless in themselves, may open the way to abuses and may destroy confidence in legal procedure.

Fillippon v. Albion Vein Slate Co. 250 U.S. 76, 81

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider of their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary. that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction. See *Stewart v. Wyoming Ranche Co.*, 128 U.S. 383, 390; *Aerheart v. St. Louis, I.M. & S. Ry. Co.* 99 Fed. Rep. 907, 910; *Yates v. Whyel Coke Co.*, 221 Fed. Rep. 603, 608, and many decisions of

the state courts collated in 17 L.R.A., N.S. 609, note to *State of North Dakota v. Murphy,* 17 N. Dak. 48. "The Circuit Court of Appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred—the question and answer having been preserved of record and counsel having been promptly notified of what had taken place and given the opportunity of excepting to the substance of the instruction and to the manner of giving it—no harm had been done, and none was probable to arise under like circumstances, and hence affirmed the judgment.

"It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. *United States v. Un. S. Fidelity Co.,* 236 U.S. 512, 529; *Guerini Stone Co. v. Carlin Construction Co.* 248 U.S. 334, 348.

"And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

We submit that the trial court here improperly, and in order to induce a verdict, communicated with the foreman, in the absence of the other eleven jurors, and agreed to abide by any recommendation for mercy the jury would make. What did this foreman who was interested enough to attempt to hold private conversations with the trial court (R. I, 534), tell the rest of the jury? No one knows

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and as heretofore pointed out, when such an event occurs in the trial of a case, it is presumed to be injurious. *Fillippon v. Albion Vein Slate Co.*, supra.

This same question was presented to the 9th Circuit Court of Appeals and the court definitely held that reversal is required.

> *Ah Fook Chang v. United States* 91 F. (2d) 805, 810
>
> "The instant case is not one where the whole jury was instructed directly by the court either orally, or in writing. By instructing one juror to instruct the rest of the jury, the instruction was in fact given to the jury in the absence of appellants, their counsel and out of court, for the juror relaying the instruction would necessarily have done so in the jury room. On that theory reversal is required. Shields v. United States, supra.[2] Further, we have the case where no one knows what the juror told the rest of the jury. If he repeated correctly the judge's instruction, the error would not be prejudicial. If he did not, the error may have been prejudicial. Little v. United States (C.C.A. 10), supra. The jury received an instruction second hand, and not by the judge. Chances for error are too great. Presuming the error to be prejudicial, the rule in Fillippon v. Albion Vein Slate Co., supra, is applicable and requires reversal."

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[2] *Shields v. United States*, 273 U.S. 583, 47 S. Ct. 478, 71 L.Ed. 787.

CONCLUSION

Petitioner respectfully submits that this Honorable Court should grant the petition for certiorari.

Respectfully submitted,

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IN THE

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OCTOBER TERM 1954

No. 209

KEITH M. BEATY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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No. 209

Keith M. Beaty, *Petitioner*,

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---

SUPPLEMENTAL BRIEF FOR PETITIONER

This supplemental brief is respectfully presented to this Honorable Court for the reason that since the filing of the petition for a writ of certiorari herein and on December 6, 1954, this Court decided the following cases involving the expenditures and/or net worth method of computing income which have an important bearing on Reason II (pages 12-16, inclusive of petition) for the granting of certiorari in this cause: *Holland v. The United States*, Case No. 37; *Friedberg v. The United States*, Case No. 18, and *Smith v. United States*, Case No. 52.

It is respectfully submitted that the dangers or pitfalls in the expenditures or net worth method of computing

income which were pointed out by this Court in these cases are present in this case.

This Court emphasized the importance of the assets on hand at the beginning point of an expenditures-net worth computation but developed with certainty the inherent weakness of the taxpayers' contentions that they had on hand at the crucial beginning point large sums of cash which accounted for the expenditures made during the taxable years involved.

However, in the Beaty case, the cash on hand at the crucial beginning point was proved by the Government itself and the fact that no credit was given the taxpayer for the cash on hand at the beginning of the period in the revenue agent's charts or computations was admitted by Government witnesses themselves. Here is a case where the Government proves the amount of cash on hand at the crucial beginning point and then admits there was no credit given for this cash in the expenditures computations for the taxable years shown on the Government charts. The cash on hand at the beginning of the period was totally disregarded by the United States and its witnesses contrary to the principles enunciated by this Court in *Holland* and *Friedberg*, supra.

In the Beaty case the Government evidence attempting to show additional income in the hands of the petitioner (according to the Government's own expert's admission) was based on items of expenditures in excess of income (R. II, 152).

Government witness Cline, a special agent, testified that he had not given petitioner any credit in his computations for cash on hand as of the beginning of the period, January 1, 1945 (R. I, 136).

Government witness Parrish, a special agent, also testified that he had not given petitioner any credit for

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funds on hand at the beginning of the period (R. I, 153-155).

The Government's own witnesses, bankers, testified that petitioner had on hand at the beginning of the period, January 1, 1945, approximately $100,000 (R. I, 125). Seventy thousand dollars of this money was released to petitioner by the bank on March 20, 1945 (R. I, 129).

Can this defendant, under the decisions of this Court in *Holland, Friedberg* and *Smith,* supra, be convicted on the expenditures basis by disregarding the known cash on hand at the crucial beginning of the period?

This question was answered by this Court in *Smith v. United States of America,* No. 52, 75 S. Ct. 194 at page 198, as follows:

> "• • • Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed. Holland v. United States, 348 U.S. 75, 75 S. Ct. 127. • • •"

Mr. Justice Clark, speaking for the Court in the *Holland* case, pointed out that the failure of the Government to run down leads might jeopardize the position of the taxpayer. The Court in this instance was speaking of leads that point back to old transactions and far removed from the prosecution period. In the *Beaty* case the Government was not confronted with the proposition of investigating various and devious leads. But, on the contrary, a simple investigation at the bank would have determined the amount of cash on hand at the beginning of the period, as shown by the bankers at the trial of this case. In the *Friedberg* case the agent testified that there was no evidence available to show that there was cash. In the *Holland* case the admission of the taxpayer, in addition to the factual evidence, did not justify the con-

tention of the cash on hand at the beginning period. In the instant case, the amount of cash on hand at the crucial beginning point was clearly shown, as was the fact that the Government did not give any credit for the known cash at the beginning of the period. The Court below, in its opinion, merely disposed of this point by stating that no explanation was given by the defendant as to the cash on hand at the beginning of 1945. (Petition for certiorari, page 40).

It is respectfully submitted that the petitioner was not called upon to explain the accumulation of assets prior to the years involved and that under the *Holland* and *Friedberg* decisions of this Court, it was reversible error for the Court below to disregard the undisputed evidence of the cash on hand at the beginning of the period and demand from the defendant an explanation of this cash accumulation.

As pointed out by Mr. Justice Clark in the *Holland* case: "Were the taxpayer compelled to come forward with evidence he might risk lending support to the Government's case by showing loose business methods or losing the jury through his apparent evasiveness." The Court further stated that this danger must be minimized.

The explanation of the *Beaty* case is simple. The Government sought to place taxable income in Beaty's, the individual's, hands by showing that in 1945 he spent $32,855.60 more than he reported and $56,595.67 more than he reported in 1946. They, the Agents Cline and Parrish, stated that they had given Mr. Beaty no credit for the cash on hand at the beginning of the period, amounting to approximately $100,000 as shown by the testimony of their own witnesses (R. 125, Vol. I, R. 136, Vol. 1, R. 153-155, Vol. 1).

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It is respectfully submitted that under the *Holland* and *Friedberg* decisions of this Court it was reversible error to allow an expenditure computation to stand without giving full credit for the cash on hand at the crucial beginning point of the computation.

In *Holland v. United States*, supra, Mr. Justice Clark, in speaking for this Court, declared:

* * * *

"As we have said, the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.

* * * *

"While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Cf. Universal Camera Corp. v. Labor Board, 340 U.S. 474, 489. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. *Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method*, the assumptions on which it rests, and the inferences available both for and against the accused. *Appel-*

late courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." (Emphasis supplied.)

• • • •

In the *Beaty* case, the District Court permitted the Government to put before the jury computations illustrated by large placards or charts, which were prepared long before the trial and which purported to show expenditures of approximately $89,000 by petitioner in excess of petitioner's income for the years in question, though Government agents later admitted that they had not given any credit in their computations for the cash the agents knew petitioner had on hand or available as of the beginning of the period for which petitioner was prosecuted. These charts were allowed to remain before the jury throughout the trial; the Government witnesses Parrish and Cline were allowed to testify from the charts; and the jury was continually given the full impact of the charts even though the Government's evidence utterly failed to support and verify the figures on the charts. Truly these charts and figures had "a way of acquiring an existence of their own, independent of the evidence which gave rise to them".

Moreover, the jury was permitted to take these charts that were made up before the trial, and admittedly not based on the evidence, into the Jury Room for perusal and study.

The Court below, in commenting on this particular phase of the trial, stated: (Page 39, Appendix, attached to petitioner's petition) "It does not appear that the charts were formally introduced in evidence, but to all intents and purpose they formed a part of the testimony."

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This is exactly what petitioner complains of, that the jury received the full force and impact of the charts when they were not introduced in evidence and were not substantiated by the Government's testimony and, yet, they were allowed to assume that the figures thereon were true and correct.

The Court of Appeals, in commenting further on this particular phase, said (Page 39, Appendix, attached to petitioner's petition) "Doubtless the more regular procedure would have required the introduction of the supporting evidence before the conclusions of the experts were shown, but this evidence was finally made available and most of it was produced before the cross-examination of the witness began." It is respectfully urged that the Court below was confused and in error to make such a statement, as the majority of the Government's testimony utterly failed to support the conclusions of the experts, but nevertheless the jury was allowed and permitted to get the full impact of the experts' conclusions which overshadowed and rendered insignicant the Government's evidence to the contrary, which later followed.

The Court of Appeals sanctioned the act of permitting the jury to take with them the charts into the jury room on the ground that the attorney for the defendant consented "to putting any and all of the evidence in". (Page 39, Appendix to petition.) This appears to be a self-contradiction, especially in view of the statement of the Court below at the beginning of this paragraph when it said: "It does not appear that the charts were formally introduced in evidence." The statement of defense attorney in nowise consented or agreed to the charts or any other figures or documents which were not evidence (R. 534, Vol. II).

The Government's case against the petitioner was apparently built up on the theory that the Beaty Service

Company, Inc., a corporation, of which petitioner was President and principal owner, earned more money than reported driving cabs during the years in question and that this money was paid to or obtained by the petitioner or defendant below.

The Government experts based their conclusion on a number of assumptions:

(1) That all moneys paid to any agent of the corporation, whether accounted for or not, went into the defendant's hands (R. 340) and the whole sum was taxable as earnings of the defendant (R. 151), and that the same sum was taxable in full as earnings of the corporation (R. 151).

(2) Although the cabs being operated by the company were, on the average, three and one-half years old, that they were operated 100% of the time (R. 177); this in the face of the Government's own evidence that considerably more than $50,000.00 had been paid out for repairs during the same period.

While the Government produced seventy-eight cab drivers and station employees, not one of them testified that the cabs were in continuous operation. To the contrary, more than 90% of them testified that a large percent of the cabs were continuously out of operation and most of them admitted that the moneys due the corporation for the cab rentals were not fully paid.

Contrary to the decisions of this Court in *Holland* and *Friedberg*, supra, the charts were taken into the jury room without guarded instructions. Instead, the instructions given by the trial court were highly prejudicial to the defendant. The charge contained such language as (R. 505, Vol. II):

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"The Government says, Gentlemen of the Jury, among the many bits of evidence from which these contentions might arise, that Mr. Beaty is guilty. It says and contends that he began here in Charlotte, and through determination and perseverance and a certain amount of luck, as we Americans are lucky individuals, that he has made some money, and that after he begun to make money in appreciable amounts that the cost of World War II was such that the rates were obviously compelled to be raised and raised appreciably, and that as those things developed the more man made and in the bigger brackets that he became or the higher altitudes he attained financially that the greater the tax began to be, and that after Mr. Beaty had begun to assume an income in fairly good-sized proportions the Government says that he then began to appreciate the fact that he had best devote some of his efforts toward eliminating some of the income which he had or taking care of it to the extent that he would not be compelled to report it."

Such instructions and procedure by the trial court were distinctly contrary to the principles enunciated by this Court in *Holland v. United States,* supra.

Furthermore, the trial court not only permitted the Government accountants to draw conclusions contrary to the evidence, but also in its rulings on the evidence shifted by direct language the burden of proof from the plaintiff to the defendant. The Court ruled that a Government expert did not need to inquire into the whole case and placed the burden on the defendant to prove the deficiencies in the Government agents' investigations and inquiries. The trial court even foreclosed the defendant's attorney from inquiry on cross-examination as to the extent of the investigation made by the Government agent, the following excerpts from the record being illustrative of this point:

"THE COURT: An expert only knows what he knows. He does not know what he ought to know. Mr. Muskoff, nobody has the foresight of God Almighty. All in the word this man could know would be the papers he examined, and he is only reposible for that. If it should be shown by something he knows that he is in error the Government is bound by that.

"MR. MUSKOFF: Are we bound only to show that he knows?

"THE COURT: How could he testify to that unless he knows, and tell the truth?

"MR. MUSKOFF: Just like your Honor so aptly stated at the closing on Friday, that in this Honorable State no one ever accuses the other unless he is sure he is right. Now what I am trying to demonstrate is that he wasn't sure he was right. * * *"

"THE COURT: He can only know that by what he saw. Now if you have records that he ought to have seen and did not see, then if you can get those records in evidence, they can go to the jury for what they are worth." (R. II, 315).

Again on cross-examination, the witness was being interrogated with reference to the large expenditures that Beaty Service Company paid for wrecker service, the expert witness, Parrish, was asked:

"Did you know that the books of Beaty Service Company showed large amounts of money having been paid to them during the course of the years 1945, 1946 and 1947?

"MR. BEAL: Objection, Your Honor. His tax return shows it, and the Government says it gave him credit.

"THE COURT: Sustained: He says he has no knowledge of it being in the shop, so he could have done otherwise than to charge it up as being in operation.

"Q. As an expert, could you not have looked and ascertained from those bills in the files that these cars could not have been in operation when they were in the shop?

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"A Those records would not give me how long they were in the shop if I had them.

"Q Would not the Pettit Motor Company records have thrown some light on that?

"A Not necessarily as to the length of time they were in there.

"Q Not worthy of being looked into by an expert?

"A I don't believe their records would show that information, sir.

"Q Don't you know as a matter of fact, as an expert, that when you take your car into a well run garage they make out a repair ticket and date it? And then bill it as of the date the repair is finished?

"MR. MONTEITH: If your Honor pleases, we object on the ground that he is not an expert in repair, car repair.

"THE COURT: Objection is sustained because he says he charged up the full amount. If there is subsequent evidence indicating in a positive way that that car was not operating at the then, of course, it would be an error. I do not see how he could know that." (R. II, 275-276).

This is contrary to the rule established in *Holland v. United States*, supra, in which this Court, speaking through Mr. Justice Clark, stated that the burden of proof remains with the Government and does not shift to the defendant and further that if the taxpayer were compelled to come forward with evidence he might risk lending support to the Government's case.

This brief has been devoted to the applicability of the *Holland, Friedberg* and *Smith* decisions of this Court to Reason II (page 12 of petition) for the granting of the petition for certiorari.

Petitioner also relies on the grounds set forth in Reasons I, III, V, VI and VII of the petition. Reason IV has been eliminated by the decision of this Court on December 6, 1954 in *Sullivan v. United States*, Case No. 64.

CONCLUSION

Petitioner respectfully submits that this Honorable Court should grant the petition for certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 209

KEITH M. BEATY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 27-45; R. IV 3-21)[1] is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 14, 1954 (Pet. 45-46; R. IV 23), and the petition for a writ of certiorari was filed on July 12,

[1] The printed record consists of four volumes, references to which will be designated "R. I" to "R. IV", respectively. References to the original transcript, of which there are eight volumes, will be designated "Tr."

1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Was petitioner prejudiced by the court's warning to the jury at the outset of the trial that their conduct might be under official observation?

2. a. Were the charts used to illustrate the testimony based upon evidence adduced at the trial?

b. Where the Government relied mainly on proof by direct evidence of specific items of unreported income, was it proper to introduce a computation of expenditures as corroboration?

c. Was petitioner entitled to a specifically requested instruction on the nature of circumstantial evidence?

3. Was prosecution properly brought in the Western District of North Carolina although petitioner's income tax returns were filed in the Middle District?

4. Was the prosecution properly authorized by the Attorney General, or did petitioner have cause to complain if it was not?

5. Did the trial court commit reversible error in telling the foreman of the jury, in open court but in the absence of the other members, that a recommendation of mercy would be proper and would be honored?

6. Did the fact that the jury was present during the objections to the court's charge deprive petitioner of a fair trial?

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7. Did the fact that the trial court, prior to the closing arguments, had agreed to give some instruction on circumstantial evidence, but then refused to so charge, deprive petitioner of a fair trial?

STATUTE AND OTHER AUTHORITIES INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

* * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(26 U. S. C. 145.)

SEC. 3740. AUTHORIZATION TO COMMENCE SUIT.

No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commssioner authorizes or sanc-

tions the proceedings and the Attorney General directs that the suit be commenced.

(26 U. S. C. 3740.)

Executive Order No. 6166, promulgated June 10, 1933 (5 U. S. C. 124-132):

> Sec. 5. The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.
>
> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.
>
> For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.
>
> Nothing in this section shall be construed to

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affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On March 4, 1952, a three-count indictment was returned against petitioner in the United States District Court for the Western District of North Carolina charging him with wilful attempts to de-

feat and evade his income taxes for the years 1945, 1946 and 1947, in violation of Section 145(b) of the Internal Revenue Code.[2] (R. I 1-4.) The acts of attempted evasion alleged were the maintenance of false books and records, the concealment of assets and sources of income, and the filing of fraudulent income tax returns. The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Corrected	Tax
Count I (1945).....	$48,490.98	$24,350.55	$254,701.83	$209,785.06
Count II (1946).....	75,265.42	42,526.74	174,715.24	125,565.03
Count III (1947)....	48,283.69	22,937.04	86,077.04	50,960.08

After a jury trial lasting approximately three weeks petitioner was found guilty as charged (R. I 491, 535-537), and was ultimately sentenced to imprisonment for two years and fined $20,000 (R. I. 551-552).

The evidence to support the verdict may briefly be summarized as follows:

Petitioner derived income from several sources during the years involved in this case. (R. I 17-18.) One of these was the Beaty Service Company, Inc., which rented and bonded taxicabs operating in Charlotte, North Carolina. (R. I 17.) Petitioner was its president and was in complete con-

[2] A second indictment, filed the same day, charged petitioner with similar attempts to evade the income taxes of the Beaty Service Company, Inc., of which he was president. (R. I 13-16.) The Government elected to proceed on the first indictment in the present proceeding. (R. I 17; R. II 7.)

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trol. (R. I 148, 150, 152, 332; R. II 11, 31, 86-87, 156, 164.)

Drivers who rented cabs from the corporation paid $10 or $12 a day. Individual cab owners who were bonded by the corporation paid $7 weekly. (R. I. 24-25.) Both rental and bonding fees were accepted by an attendant at the headquarters of the taxicab fleet. The attendant recorded them on a daily check sheet, placed the money in an envelope, and dropped the envelope through a slot in the top of a safe. The attendant did not have access to the safe and the contents were removed by petitioner or one of his relatives and taken to petitioner's office. (R. I 26-27, 97-103; R. II 12, 32, 34-36, 46-48.) Petitioner took charge of the money and made the bank deposits, and the deposit slip was then given to the bookkeeper as a basis for entering the receipts in the corporation books. (R. II 29-32, 153-155, 161.) In addition to making the deposits, petitioner at times brought in as much as $900 in small bills and exchanged them for large ones but did not deposit this money. The banks were required by the Federal Reserve system to report such currency exchanges only if the amount exceeded $1,000.[3] (R. II 22-28.)

Since the books simply recorded the total of the deposits,[4] the examining revenue agents asked peti-

[3] In several instances petitioner borrowed amounts from $20,000 to $50,000 from a bank and deposited an equal amount of cash with the bank as collateral. (R. I 125-130; R. II 96-98.)

[4] Petitioner had been advised by his bookkeepers to keep a more detailed record of receipts. (R. I 114; R. II 163.)

tioner for the daily check sheets on which the payments of the individual drivers had been recorded. Petitioner said he would try to get them but a few days later told the agents that they had been destroyed.[5] (R. II 13, 103, 118-120.) Accordingly, in order to determine what the receipts had been, the agents interviewed over one hundred drivers who had paid either rental or bonding fees during 1945, 1946 and 1947, and examined records of the Charlotte police department which contained personnel records of the drivers and semi-monthly reports filed by petitioner indicating the number of cabs and the names of the drivers operating under the corporation's rental and bonding system.[6] (R. I 19-21, 142-143; R. II 17-20, 54-56.) Whenever there was evidence that a driver, whose name was reported by petitioner in the semi-monthly reports, was actually not operating a cab for a period of time, the agents charged no income to the corporation for that period. (R. I 175, 179-180.) The investigation also uncovered numerous instances in which the corporation, acting through petitioner, had sold used cars and had failed to report the full purchase price. (R. II 61-70, 121-137.) Upon the basis of all this evidence the agents calculated that during the years 1945, 1946 and 1947 the corpora-

[5] The envelopes had also been destroyed. (R. I 406.) Records of expenditures, on the other hand, had been preserved. (R. I 400; R. II 160-161.)

[6] About seventy-five of the drivers testified for the Government at the trial (R. I 43-55, 68-111, 413; R. II 32-52, 72-77) and petitioner's semi-monthly reports and other evidence indicated the names of many others (R. I 414-457).

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tion had received the following additional amounts of income, over and above those reported in the corporate return—$55,103.29, $32,461.97, and $21,696.85. (R. II 145-150.) Since the corporation was controlled by petitioner, since its books and records did not record these receipts, and since the receipts in general had been shown to reach petitioner for deposit, the Government attributed this additional income to him. (R. I 148-152.)

The Lancaster Distributing Company, which did a wholesale whiskey business, was set up as a sole proprietorship of E. C. Pundt, but there was much evidence from which it could be concluded that petitioner was the actual owner. (R. I 33-34, 112-125; R. II 52-53, 81-85, 88-95.) Pundt paid income taxes. (R. I 33.) If petitioner had reported this income his tax would have been determined at a much higher rate, and by having Pundt report it he saved $13,142.09 in 1945 and $13,830.72 in 1946. (R. II 113-115.)

Upon the basis of evidence of the above and other sources of income, the Government computed that petitioner had failed to report taxable income in the following amounts (R. I 34-41; R. II 145-152):

1945	$142,402.94
1946	80,328.17
1947	21,161.12

In partial substantiation of the above computation (R. I 152) the Government adduced proof to show that petitioner's expenditures for the years

1945 and 1946 were considerably in excess of his known resources. The excess was $32,855.60 in the first year and $56,695.67 in the second. (R. II 106-112.) Petitioner sought to show that this could be accounted for by the use of cash which he had previously deposited with banks as collateral on loans, but Cline, the revenue agent who prepared the expenditures computation, testified that, while petitioner did have cash on hand at the beginning of 1945, he did not use it for any of the expenditures included in the Government's computation.[7] (R. II 116-117.)

ARGUMENT

1. Apprehensive at the outset of the trial that an attempt might be made to tamper with the jury, the judge instructed them at considerable length on the importance of their duties and the necessity of avoiding any discussion of the case with others. (Tr. IV 50-57.) He told the jurors that, although under the circumstances he could hold them together under surveillance of court officials for the duration of what promised to be a long trial, he would not keep them away from their families but would trust to their good sense to obey his instructions. (Tr. IV 51-52.) And in the course of instructing them to repel all outside attempts to influ-

[7] Petitioner asserts (Pet. 13) that, as of January 1, 1945, he had $100,000 thus on deposit in banks to secure loans. As we read the record the amount on deposit at that time was only $50,000. (R. I 126-130, 153-154.) Although other sums had been deposited to secure loans of the Lancaster Distributing Company these were apparently not released until the affairs of that concern were wound up in 1947. (R. I 124; R. II 16.)

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ence them he remarked that they might be watched by some agency whose duty it was to see that a fair verdict was rendered. (Pet. 49-50; Tr. IV 53-54.) There was no objection, but petitioner now complains (Pet. 2, 11) that this was prejudicial error.

There is no merit in the argument. There was no actual contact by an outside agency as there appeared to have been in *Remmer* v. *United States*, 347 U. S. 227. All jurors must realize that they are constantly under the surveillance of court officials, at least in the court house, while a trial is in progress. Certainly the court's warning was less prejudicial to the petitioner than locking up the jury would have been, but that step would clearly have been within the court's discretion. We submit that the Court of Appeals was correct in holding (Pet. 44) that the warning was proper.

2. Petitioner urges (Pet. 2-3, 12-16) that the opinion of the court below presents several of the same issues raised by the group of so-called "net worth" cases[8] in which this Court granted certiorari on June 7, 1954 (347 U. S. 1006, 1008, 1010). He implies that the Government's proof of unreported income was mainly based upon Agent Cline's computation showing expenditures in excess of known resources, and he argues that the

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[8] *Friedberg* v. *United States*, No. 18; *United States* v. *Calderon*, No. 25; *Holland* v. *United States*, No. 37; *Smith* v. *United States*, No. 52. In all of these cases the Government was forced to rely mainly upon proof of unexplained increases in annual net worth in order to show unreported taxable income.

Government's proof was circumstantial, that the charts used by the agents to illustrate their computations were not based on the evidence, and that the trial court should have given a specific instruction on the nature of circumstantial evidence. We submit that the issues presented by the "net worth" cases now pending before this Court are not raised by the record in this case. Here, the Government proved specific items of unreported income and its proof was largely direct rather than circumstantial.

a. The backbone of the Government's case was the testimony of the taxi drivers and the semi-monthly reports submitted to the City of Charlotte by petitioner showing the number of cabs and the names of the drivers operating under the corporation's rental and bonding system. Upon the basis of this direct evidence Agent Parrish submitted a computation, illustrated by charts, showing the amounts of unreported rental and bonding fees received by the corporation. The use of such charts is, of course, well recognized. *United States* v. *Johnson*, 319 U. S. 503, 519; *Gendelman* v. *United States*, 191 F. 2d 993, 995-996 (C. A. 9th), certiorari denied, 342 U. S. 909. But petitioner complains (Pet. 8, 12) that Parrish prepared his charts before trial, that he was allowed to place them before the jury at the beginning of the trial, and that they were, therefore, not based upon the evidence in the case.

It is true that the charts were prepared prior to

trial and were shown to the jury at an early stage. (R. I 34, 184.) But Parrish had already given a general description of his examination of numerous records and he had testified that the charts represented the results of his own investigation. (R. I 17-34; R. II 7-16.) The defense waived cross-examination at that time (R. I 42), and Parrish was succeeded on the stand by approximately seventy-five taxi drivers (R. I 413) and numerous other witnesses. Thereafter, Parrish returned to the stand, repeated his computation of petitioner's unreported income with some minor corrections necessitated by the testimony of the witnesses (R. I 142-144; R. II 118-153), and then was subjected to a long and searching cross-examination (R. I 144-340). He testified repeatedly that the charts represented information obtained from petitioner's books and records and the evidence presented at the trial, although he admitted that a few small corrections were necessary. (R. I 143-144, 166-167, 170-171, 179-180, 184-185, 211-212, 214, 215-217, 225, 226-227, 229-230, 270-271, 307-308, 336.) We think it clear that Parrish's charts and computations were adequately supported by the evidence.

b. Petitioner implies that the Government relied heavily upon the expenditures computation of Agent Cline to establish unreported income, and he argues (Pet. 7, 13-15) that this computation was faulty because it failed to take into consideration the alleged $100,000 cash which petitioner had on deposit as collateral for bank loans at the starting

point, January 1, 1945. But, as we have shown (*supra*, pp. 7-10), the Government's case was based upon specific items of unreported income, and Cline's expenditure computation was used only as partial corroboration. In his charge to the jury the trial judge gave a rather lengthy summary of the Government's contentions (R. I 505-510, 519-521), as well as those of the defense, but he did not even mention the expenditures computation. And he told the jury, in partial compliance with a defense request, that any cash which petitioner had on hand as of January 1, 1945, would not constitute income for the years involved in this case. (R. I 480, 528-529.) Consequently, the expenditures computation was a collateral matter of relatively minor importance, even if it were incomplete, and the jury would have been required under the court's instruction to disregard it in so far as they believed that the unexplained expenditures could have come from cash on hand as of January 1, 1945.

Furthermore, Cline testified that, although petitioner did have cash at the starting point, none of this cash could have been used for the particular expenditures which he included in the computation (R. II 117), and Parrish stated flatly that it would not upset the computation (R. I 157). The year 1947, the last of the three years involved in the indictment, was not even included in Cline's calculations. According to him petitioner had unexplained expenditures amounting to over $89,000 in 1945 and 1946 (R. II 112), and the $50,000

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which he had on deposit as collateral at the beginning of 1945 [9] would provide no satisfactory explanation even if the jury disbelieved Cline's testimony that none of the expenditures came from this cash.

The Government's proof of the specific items of unreported income was clearly sufficient to establish a *prima facie* case, and the expenditures computation was an added relevant circumstance to which the jury could give such weight as it saw fit.

c. Assuming that the Government's proof was entirely circumstantial, petitioner contends (Pet. 3, 15-16) that the trial court should have given a specifically requested instruction on the nature of circumstantial evidence over and above the usual charge on reasonable doubt. The question of the right of a defendant to have the jury instructed in this manner arises where the Government, as in the so-called "net worth" cases, is forced to rely upon an indirect method in proving unreported income.[10] It does not arise here, for, as the opinion of the Court of Appeals points out (Pet. 43), the evidence for the Government was largely direct. The Government proved by direct evidence (*supra*, pp. 6-9) that petitioner dominated the corpora-

[9] The amount thus available to explain expenditures during 1945 and 1946 was only $50,000, instead of $100,000 as petitioner asserts. See footnote 7, *supra*, p. 10.

[10] See *Holland* v. *United States*, *supra*; and *McFee* v. *United States*, No. 15, certiorari denied March 15, 1954 (347 U. S. 927, order vacated and case restored to the docket June 7, 1954 (347 U. S. 1007).

tion, that the corporation received numerous rental and bonding fees which were not recorded on its books, and that all the rental and bonding fees found their way into petitioner's hands. And the Government proved by direct evidence that petitioner was the actual owner of the Lancaster Distributing Company. (R. II 52-53, 81-85.) It is undisputed that it is not error to refuse to instruct the jury on circumstantial evidence where the proof is, at least in part, direct. *Campbell* v. *United States*, 47 F. 2d 70, 71 (C. A. 5th); *Herman* v. *United States*, 48 F. 2d 479, 480 (C. A. 5th); *Sloan* v. *United States*, 31 F. 2d 902, 906 (C. A. 8th); *Portman* v. *United States*, 34 F. 2d 406, 408 (C. A. 8th); *Carnahan* v. *United States*, 35 F. 2d 96, 104 (C. A. 8th), certiorari denied, 281 U. S. 723; *Sullivan* v. *United States*, 32 F. 2d 992, 994 (C. A. 9th); *McMillan* v. *United States*, 27 F. 2d 94, 96 (C. A. 8th); Randall, Instructions to Juries, Sections 226-227; Branson, Instructions to Juries (3rd ed., 1936), Section 65.

3. Petitioner's residence and principal place of business were at Charlotte in the Western District of North Carolina. He was required to file his income tax returns, however, at Greensboro, which is located in the Middle District. He was indicted and tried in the Western District, and now he contends (Pet. 3, 17-20) that he should have been tried in the Middle District.

The underlying assumption of the argument is that the offense alleged in the indictment was the filing of a false return. But the essence of the offense prescribed by Section 145(b) of the Inter-

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nal Revenue Code (*supra*, p. 3) is a wilful attempt to defeat and evade income taxes, and such an attempt obviously may require the performance of many acts in addition to the ultimate filing of the fraudulent return. *Spies* v. *United States*, 317 U. S. 492, 498-499. Such additional acts were alleged in the indictment in this case (*supra*, p. 6) and the proof showed that almost all of petitioner's pertinent actions had occured within the jurisdiction of the District Court for the Western District. Moreover, the trial of the defendant at his home was consistent with the opinion of this Court in *United States* v. *Johnson*, 323 U. S. 273, where this Court held that a law should be construed to permit the trial of a defendant in his vicinage if possible. Cf. *United States* v. *Wilson*, 344 U. S. 923.

4. Prior to trial petitioner filed a motion to dismiss the indictment on the ground that the case had not been presented to the grand jury pursuant to the direction of the Attorney General. It was contended that prosecution for violation of the revenue laws must be initiated by the Attorney General, under the requirements of Section 3740 of the Internal Revenue Code (*supra*, pp. 3-4), Section 5 of Executive Order 6166 (*supra*, pp. 4-5), and Circular Letter No. 2431 issued by the Attorney General on August 10, 1933.[11] (R. I 4-7.) The

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[11] The pertinent portion of Circular Letter No. 2431 is as follows:

> In accordance [with Section 5 of Executive Order 6166], all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue

motion was denied. (R. I 12.) Although the point was not raised in the Court of Appeals, it is now stated (Pet. 3-4, 21) as one of the grounds for allowance of the writ.

A similar contention has been raised in *Sullivan* v. *United States*, No. 64, certiorari granted, 347 U. S. 1010, June 7, 1954. As we pointed out in our brief in opposition to the petition in that case,[12] we believe that the grand jury has plenary power to investigate and return indictments on all criminal matters within the jurisdiction. In our view Section 3740 of the Internal Revenue Code has no application to criminal cases, and Executive Order 6166 and Circular Letter 2431 simply concern the internal functioning of the Department of Justice and confer no rights upon defendants. Moreover, the present case is sharply distinguished from *Sullivan*, for there is no dispute that here the Attorney General directed the United States Attorney to call a special grand jury to inquire into probable violations of federal law, that he directed the United States Attorney to cooperate with the grand jury to the fullest extent, and that the indictment of petitioner was prepared at the specific direction of the grand jury. (R. I 8; R. II 1-4, 6-7.) Since the Attorney General had given the United States Attorney a general authorization to cooperate with the

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laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted.

[12] No. 747, October Term, 1953.

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grand jury we think petitioner's point has no merit. However, because of its relation to the contention in the *Sullivan* case this court may wish to withhold action on the present petition pending a decision on *Sullivan*.

5. During the jury's deliberations the foreman returned to the court room alone and asked the trial judge, in open court, whether a recommendation could be made because of petitioner's health. The judge replied (R. I 534):

> A recommendation is always proper to be made by the jury, and if made by the jury as part of their verdict returned will be adhered to by the Court.

Defense counsel raised no objection to this proceeding.

Ultimately the jury returned with a written verdict which, after finding petitioner guilty as charged, continued as follows (R. I 535-536, 537, 546-547):

> Recommend that the Court take into consideration the health condition of Mr. Beaty; therefore, we recommend mercy.

Thereafter the jury was polled upon request by the defense and found to be unanimous. (R. I 535-537.)

Defense counsel filed a long motion for new trial assigning thirty-eight alleged errors. (R. I 538-543.) One of these (No. 8) charged that the court erred in conferring with the foreman in the absence

of the rest of the jury, another (No. 29) charged that the verdict was the result of a bargain, but no point was made of the fact that the court had promised the jury to abide by their recommendation. After the motion had been disposed of, the trial judge indicated that he felt bound, in view of the jury's recommendation, to appoint two physicians to examine petitioner, and, with the acquiescence and apparently the cooperation of defense counsel, this was done. (R. I 544-550.) The physician reported that petitioner was normal and in good condition, and sentence was then imposed. (R. I 550-554.)

Petitioner now contends (Pet. 4, 21-22) that the trial court erred in instructing the foreman in the absence of the other jurors, and that the verdict was the result of a trade or compromise. But there is nothing in the record to indicate that the jury returned a compromise verdict. And, as the opinion of the court below points out (Pet. 44-45), the communication of the court to the foreman alone was manifestly not prejudicial, since it is clear from the jury's written verdict that the foreman transmitted the court's instructions accurately. Petitioner had it within his power to insist that all the jurors be present in the court room. The irregularity, if any, was waived by the failure to object at the proper time. See Rule 30, Federal Rules of Criminal Procedure, *supra*, p. 5.

It is also urged that the court should not have promised to follow the jury's recommendation. But petitioner, instead of objecting to the court's statement, remained silent on the subject just as long as

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it appeared that he stood to reap some benefit therefrom. He did not object when the statement was made; he did not object when the verdict was returned; he did not raise the point in the motion for a new trial; and he readily cooperated in the physical examination. Only after it appeared that there was no health problem to be considered did he raise the point on appeal. It appears likely that defense counsel, far from considering the court's promise erroneous, actually welcomed it when given. On the other hand, if counsel thought it a mistake on the court's part, and hoped to sow error in the record by failing to make timely objections, they are now faced with the prohibition of Rule 30. As the Court of Appeals for the Seventh Circuit said recently in *United States* v. *Furlong,* 194 F. 2d 1, 3, certiorari denied, 343 U. S. 950:

> [Rule 30] is intended to prevent a litigant from taking advantage, after verdict, of the giving of an erroneous instruction to which he failed to call attention in time to afford the court an opportunity to correct it.

See also *Wyche* v. *United States,* 193 F. 2d 703, 705 (C.A.D.C.), certiorari denied, 342 U. S. 943; *Villaroman* v. *United States,* 184 F. 2d 261, 262-263 (C.A.D.C.); *Jackson* v. *United States,* 179 F. 2d 842 (C.A. 2d), certiorari denied, 339 U. S. 981; *Cave* v. *United States,* 159 F. 2d 464, 469 (C.A. 8th), certiorari denied, 331 U. S. 847. The case is clearly distinguishable from *Demetree* v. *United States,* 207 F. 2d 892, 895 (C.A. 5th), in which the jury, after informing the trial judge that they were

deadlocked, received assurance that the punishment would be lenient. The "plain error" rule may not be invoked under such circumstances as those presented by the present record. See *Ryan* v. *United States*, 99 F. 2d 864, 865 (C.A. 8th), certiorari denied, 306 U. S. 635, and *Goldstein* v. *United States*, 73 F. 2d 804, 806-807 (C.A. 9th); and cf. *United States* v. *Parker*, 103 F. 2d 857, 862-863 (C.A. 3d), certiorari denied, 307 U. S. 642.

6. Petitioner urges (Pet. 4, 16, 22-23) that the trial court erred in not excluding the jury at the conclusion of the charge. Rule 30 requires that an opportunity be given to make objections out of the hearing of the jury, but in this case defense counsel launched upon his objections without approaching the bench or requesting that the jury be excluded. Petitioner suffered no detriment from what transpired. Although complaint is made that defense counsel were characterized by the judge as "zealous", it is clear that this remark was meant to apply to the attorneys for the prosecution as well. (R. I 530-531.) The Court of Appeals correctly held (Pet. 43) that petitioner was not prejudiced.

7. Petitioner requested a special instruction on the nature of circumstantial evidence, a request which the court, prior to the closing address by defense counsel, indicated it would grant with some modifications. (R. I 478, 488-489.) The instruction was not given, however, and the court, in reply to petitioner's objection, stated in effect that this was not a circumstantial evidence case. (R. I 530). Petitioner complains (Pet. 4, 15, 16, 24) that his argument to the jury was nullified.

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The contention is without merit. There is no way to determine whether the closing argument for the defense was nullified since it has not been included in the record. But certainly, if this had been the case, counsel would not have been content with the mild objection he registered at the conclusion of the charge. (R. I 530.) Furthermore, as we have shown above (*supra*, pp. 15-16), petitioner was not entitled to anything more than the usual instruction on reasonable doubt and the trial court was correct in ultimately rejecting the requested charge.

CONCLUSION

We believe that the decision below is correct and that no question calling for review is presented. It is respectfully suggested that the petition be denied unless the Court desires to hold it in abeyance pending decision in the *Sullivan* case in view of the somewhat similar issue involved in the two cases.

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AUGUST, 1954.

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No. 215

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

JACOB STRAUCH, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

ALEX STRAUCH, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

HARRY BENJAMIN SHER, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

JACOB STRAUCH, Petitioner,
vs.
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ALEX STRAUCH, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

HARRY BENJAMIN SHER, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Jacob Strauch, Alex Strauch, and Harry Benjamin Sher, in these consolidated cases, pray that a writ of certiorari issue to review an order and judgment entered by the Court of Appeals for the Sixth Circuit on April 21, 1954, and the opinion denying the petition for a rehearing entered on June 17, 1954. Said order and judgment affirmed a judgment under which petitioners were convicted and sentenced in the District Court for the Middle District of Tennessee, whereby the petitioners Alex Strauch and Jacob Strauch were each sentenced to three years in the penitentiary and the petitioner Harry Benjamin Sher was sentenced to four years in the penitentiary, and each of the petitioners required to pay a fine of

$5,000.00 and costs for an alleged violation of the provisions of Title 26, section 145 (b) of the United States Code, for wilfully filing false and fraudulent income tax returns for the years 1944 and 1945 and in the case of Jacob Strauch for the additional year of 1946.

OPINIONS BELOW.

The District Court wrote no opinion. The Court of Appeals wrote no opinion disposing of the original appeal but simply entered a two page order affirming the convictions. On petition to rehear the Court of Appeals filed an opinion with one judge filing a dissenting opinion, he having changed his conclusions and felt that the convictions should be reversed. Neither the order of affirmance nor the opinions filed on the petition to rehear have yet been reported, but may be found as an appendix to this petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 21, 1954, and the petition for rehearing was overruled on June 17, 1954. Thereafter an order was entered staying the mandate of the Court pending the filing of this petition. The jurisdiction of this Court is invoked under the provision of Title 20, Section 1224, par. (1) of the United States Code.

QUESTIONS PRESENTED.

The questions presented for review by this petition are:

1. Is evidence of an offer made by a taxpayer in an effort to compromise his civil income tax liability admissible upon the trial of a criminal case in which the taxpayer is charged with wilful and fraudulent income tax evasion?

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2. In the prosecution of a criminal income tax case where the Government seeks to establish tax liability by the so-called "net worth method," if the Government is unable to prove a net worth for the beginning of the period in which it is alleged that the tax liability accrued, should the Court strike all of the evidence relating to the net worth of the taxpayer at other times?

3. Does it amount to plain error affecting substantial rights for the Court to charge the jury what the minimum as well as the maximum penalty might be in the event of a verdict of guilty and to remind the jury that should the defendants be acquitted, the Government could not have their verdict reviewed on appeal?

STATUTES AND RULES OF PROCEDURE INVOLVED.

The petitioners were convicted for alleged violation of the provisions of Title 26, Section 145 (b) (Internal Revenue Code), which reads as follows:

> "(b) Failure to collect any pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution (26 U. S. C. 1946 Ed., Sec. 145 [b])."

Rules 30 and 52 (b) of the Federal Rules of Criminal Procedure, which read as follows, are likewise involved:

"Rule 30.

. . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

"Rule 52.

(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

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STATEMENT OF THE CASE.

During the years for which the indictments were returned in these cases, the petitioners were engaged as partners in the jewelry business in Memphis, Tennessee, under the name Strauch & Sher. The Government sought a conviction of the petitioners by attempting to prove that a number of entries shown on their books to be for business expenses or for the purchase of inventory, actually represented a division of profits and, further, to show in at least the case of Jacob Strauch by the so-called "net worth method" that his wealth had increased far beyond the amount upon which he had reported and paid income tax.

In an effort to show that the petitioners had withdrawn money from the partnership under the guise of expense when in fact it represented a division of profits, the Government proved that on September 3, 1943, there was exactly $3,000.00 withdrawn from the partnership account and divided $1,000.00 to each of the petitioners as a refund of traveling expenses (R. 385).

After this was proven, the Court permitted the Government to prove, over the most strenuous objections on the part of all of the petitioners, that in an effort to compromise their civil tax liability with the Government, the petitioners had given the Government a profit and loss statement headed "Restatement of Partnership Income" in which this $3,000.00 item was removed from expenses and charged to "Distribution of Profits" (R. 387, 393; See Plaintiff's Exhibit No. 18, R. 498). The petitioners' objection to this evidence was that the statement was furnished to the Government by the petitioners in support of and as a part of an offer to compromise their civil tax liability and was, therefore, inadmissible in a criminal prosecution (R. 387, 393). The learned trial Judge not only overruled the petitioners' objection, but stated:

> "Well, I don't see why a person wouldn't be required to tell the truth in compromising the civil liability just the same as they would the criminal liability."

And again:

> "Well, when a person makes a statement for the purpose of getting an adjustment he is supposed to be telling the truth" (R. 393).

The devastating effect of the admission of this evidence over the protest and objection of the petitioners was recognized by the trial Judge when he stated in the argument of the motion for a new trial that this restatement of partnership income "occupies practically the same legal status that a confession would" (R. 571).

Immediately following this proof the Government introduced five checks drawn on the Strauch and Sher account, all payable to cash and all dated December 22, 1943. One of these checks was in the amount of $7,800.00, and bore a notation that it was for the payment of an account with Al Gershh, a wholesale jeweler in New York. The second was for $6,000.00 and showed on its face "cash balance for merchandise, J. Lewis, New York City." The third was for $8,200.00 and showed "balance due for merchandise to Ed Wayne." The fourth was for $5,100.00 and showed "balance due I. Silverstein for merchandise," and the last one was for $2,900.00 "balance to Phillip Figarsky for merchandise" (R. 397-398).

Although it was shown by both the petitioners (R. 417) and the Government (R. 102) that many of the partnership's purchases were made in cash rather than by check because they were buying on the black market at prices above ceiling, it was the Government's insistence that these particular checks were not for the purchase of merchandise, but constituted a division of profits among the

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petitioners, since all of the checks were given on the same day and, while they were in odd amounts, they totaled exactly $30,000.00, which would have given each of the partners a $10,000 distribution.

Next, the Government proved that on January 9, 1945, three checks were drawn on the account of Strauch and Sher, all payable to cash, in the amounts of $11,510.00, $10,890.00, and $7,600.00. These checks showed on their face that they were each given for a "refund of merchandise advanced." While the checks were not shown on the partnership's expenditure book, the check stubs showed that they were given for the following accounts: The first one was to Jacob Strauch to reimburse him for accounts paid by him on behalf of the partnership to Leon Samet and Milton Greenberg, both of New York. The second was used to pay accounts owed to Lang, Jewelers, and I. Berkowitz, both of New York. And the third check was to pay Felix Mendelsohn and Milton Greenberg the accounts owed them by the partnership (R. 257-258, 401-404). It was the theory of the Government that since all of these checks were dated the same day and the total of the checks amounted to exactly $30,000.00, the same amount as the total of the five checks which had been introduced, dated in 1943, and since in January of 1945 Mr. Jacob Strauch made two $5,000.00 cash deposits in his own personal account, one of which was marked "Advance from S. & S." that these checks were not in payment of the bills which they purported to pay but constituted a distribution of profits (R. 258).

In addition to the foregoing evidence, the Government attempted to show that Jacob Strauch had underpaid his income taxes by the so-called "net worth method." Over objection of the petitioners, the Government was permitted to show that Mr. Strauch had furnished a net worth statement to the Government showing assets as of November

1, 1946, of $133,643.99, with liabilities of $20,600.00, making a net worth of $113,043.99 (R. 104-105, Plaintiff's Exhibit No. 9, R. 495). In admitting this testimony, the Court stated:

> "Now, of course, as I view it, this net worth statement would not be competent evidence unless the Government is able to prove the net worth at a prior date. I would think that the logical method of presenting it would be to select your beginning date first and prove the net worth and then prove this. But you've gone at it backwards, it looks to me like. But go ahead. I guess you will get the same result, **but unless you are able to establish the net worth at a prior date, then this evidence will be incompetent.**"

In an effort to prove a beginning net worth, the Government introduced the testimony of a banker from Memphis, Mr. Elmo Cox, who testified that on May 13, 1940, Mr. Jacob Strauch had given his bank a net worth statement in connection with an application for a loan in the amount of $4,000.00 (R. 161, 166). In this statement Mr. Strauch showed assets of $29,289.00 and liabilities of $250.00 (R. 163). Mr. Cox stated that many times a borrower in giving his financial status, would only include sufficient assets to justify the loan "without disclosing everything they've got" (R. 165, 166). Objection was made by the petitioners to this testimony, upon the ground that the proper date to ascertain the net worth of the petitioners was January 1, 1944, and not May, 1940. This objection was overruled, the Court stating:

> "Of course, that leaves a hiatus in there of two or three years they'll have to account for some way or the other. I don't know whether the Government is in a position to do that or not. They may be able satisfactorily to do that, or they may not be able to satisfactorily do it" (R. 163).

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In an effort to bring the 1940 financial statement up to January 1, 1944, the Government proved that in 1942 and 1943 Mr. Jacob Strauch reported, for income tax purposes, a net income of $4,420.38 and $5,218.38, respectively (R. 197). The Court then held that the records of the Government tending to show the income of Jacob Strauch for the years 1940 and 1941 were not admissible, as being improperly certified (R. 197, 201). Thereafter, the petitioners asked the Court to exclude all evidence of net worth of the petitioner, Jacob Strauch, because the Government had failed to show his net worth at the beginning of the period in question, or on January 1, 1944, for the reason that they did not show how much his net worth had been increased during the years 1940 and 1941. The Court overruled the motion and permitted the jury to consider all of the evidence introduced relating to net worth (R. 259-260).

When this insistence was again raised on motion for a new trial, the learned trial Judge observed:

> "Well, if you had objected to it at that time I would have sustained it. When the Government closed its case, I mean, if you had objected to that particular evidence I would have sustained it on the ground that it wouldn't have anything to do with the case. . . . I admitted it in the beginning because I thought the Government was going to proceed on the net worth theory, but it appeared that they didn't. They abandoned that" (R. 557).

It was then pointed out to the trial Judge that immediately upon the Government resting its case the petitioner made the following request:

> "May it please Your Honor, at this time we desire to move the Court to exclude from the consideration of the jury the testimony of the Government's witness Simpson with reference to net worth of the defendant Jacob

Strauch as of January 1, 1946, I believe, and the testimony of the witness Cox as to the net worth of the defendant Jacob Strauch as of January 1, 1940, on the ground that there has been no connection between those two net worths, and since the Government has now closed, I didn't want to have to go into that with this witness" (R. 259).

It was also pointed out that this objection was overruled; however, despite this statement by the Court, the Court took the motion for a new trial under advisement and later overruled it.

Finally, in his charge to the jury, the trial Judge stated:

"These indictments, ladies and gentlemen of the jury, were returned under Section 145 (b) of Title 26 of the United States Code, which provides, so far as it pertains to these charges, that any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

"Now, as the Court has charged you, your duties as jurors consist of a fact-finding body, and when you have reached a verdict in the case, either guilty or not guilty, then your duties are at an end. **If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury.** If your verdict is guilty, then of course it becomes the duty of the Court to pass sentence. You have nothing whatever to do with the fixing of any sentence in any case, but merely to hear the evidence in the case and determine from that evidence whether or not the charges are sustained, whether or not the defendant is guilty or not guilty.

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"Now, as to the matter of the punishment provided by the statute, that means that the Court in passing sentence may fine the defendant any amount, according to the discretion of the Court, from one cent up to ten thousand dollars. There is not any definite amount fixed in the statute that the Court must fine the defendant. The statute says that 'Upon conviction thereof, the defendant may be fined not more than ten thousand dollars.' That means that the Court could fine him any amount from one cent to ten thousand dollars. 'Or imprisoned for not more than five years.' That means the Court could order him imprisoned for any length of time from one minute up to five years, according to the punishment that the Court might think is justified in this case. That does not mean that the Court has to impose a fine of ten thousand dollars or a sentence of five years, but leaves it to the discretion of the Court." (Emphasis added.) (R. 485-486.)

REASONS FOR GRANTING THE WRIT.

1. The Opinion of the Court of Appeals Is in Conflict With Its Opinion in the Case of Ecklund v. United States, 159 F. 2d 81.

As above stated one of the two theories advanced by the Government to prove the guilt on the part of the petitioners was that they had withdrawn certain monies from the partnership under the guise of purchasing merchandise and paying operating expenses when in fact the withdrawals represented profits. In the main, this theory was supported only by indirect inferences from the record as, for example, the occasions at which certain money was withdrawn near the end of the year and the even amounts that were withdrawn—exactly $30,000.00 on two occasions. It is highly doubtful that the jury would have accepted

any such theory especially in view of the type witnesses who testified for the Government, at least one of whom the Judge placed in jail "until his memory was improved" (R. 160), about whom the Court stated "I wouldn't believe him on oath" (R. 169), except for the admission of "Restatement of Partnership Income" into the evidence.

Several years before the indictments in these cases and before the file was even referred to the Department of Justice for prosecution, petitioners had been in conferences with the Treasury Department in an effort to adjust their civil tax liability. As a basis of compromise, the petitioners submitted the so-called "Restatement of Partnership Income" to the Treasury Department. This statement transferred $3,000.00 from expenses to distribution of partnership income exactly in accord with the theory of the Government on the prosecution of the criminal cases. The effect of this evidence on the jury was tremendous, particularly in view of the comment made by the trial Judge when its introduction was objected to that "I don't see why a person wouldn't be required to tell the truth in compromising a civil liability just the same as they would a criminal liability" (R. 393).

We respectfully submit that evidence of an offer to compromise a civil liability is inadmissible in a criminal prosecution. This exact question was determined in the case of **Ecklund v. United States**, 159 F. 2d 81, wherein the Court of Appeals held:

> "Evidence of a civil-liability settlement previously made by the defendant in a criminal case of this character would have no real probative value to the effect that he had wilfully violated laws and regulations governing sales prices.
>
> * * * * * * *
>
> "It has long been recognized that evidence of an effort to compromise is inadmissible in a civil case. Home Insurance Co. v. Baltimore Warehouse Co., 93

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U. S. 527, 548, 23 L. Ed. 868. Why, then, should evidence of a settlement of a civil case be received in a criminal prosecution where the essential ingredients of liability are wholly at variance, in that no proof of wilful violation is necessary to establish civil liability but is a conditio sine qua non to criminal liability?

* * * * * * *

"The erroneous admission of the prejudicial evidence in this manner could well have tipped the scales against Ecklund in the weighing by the jury of the closely balanced conflicting testimony."

The holding in the present case is squarely in conflict with the holding of the Ecklund case. By its order of affirmance and again by its opinion overruling the petition to re-hear, the Court of Appeals held that the Restatement of Partnership Income was not a "proposition to compromise their possible civil income tax liability and that Ecklund v. United States, 159 Fed. 2d 81 (C. A. 6), does not control." Such an insistence was not even urged by the Government and, as we read the record, all parties as well as the trial Court recognized and agreed that this statement was made in support of, and as a part of, an offer in compromise. At the time the exhibit was offered, counsel for petitioners objected that this was "a computation of income taxable to the partnership which was offered in Washington at a conference in an effort to settle the income tax liability of these three defendants" (R. 387).

Although the United States Attorney claimed that the paper itself was not an offer in compromise, he conceded that: **"this is a statement of fact offered in support of the offer"** (Emphasis added) (R. 387).

The Trial Judge, after these statements had been made, was still not satisfied as to the purport of the exhibit, and

asked for a further explanation of the exhibit, whereupon counsel for the petitioners stated to the Court:

> "If your Honor please, that document, the restatement, as well as the statement signed by those individuals, was prepared by myself and my partner, Mr. Eichenbaum, who were called in on this case at an early stage, and without having an opportunity to thoroughly examine all the records and all the facts; that statement was prepared and the restatement of income was prepared on the train from records available there on the way to Washington for the purpose of presentation at a conference when an attempt was being made to settle the civil tax liability involved, at which time we conceded that these records themselves were not substantiated in some instances by documentary proof, and for that reason some items, if there was a doubt and no documentary proof was available to substantiate them, as this entry in issue here, **for the purpose of compromise we included that in the recomputation of income.**" (Emphasis added.) (R. 387-388.)

This statement was not excepted to or contradicted in any way by the attorneys representing the Government. All parties recognized that this document was filed by the petitioners with the Government in an effort to compromise and settle their civil income tax liability, and it could not have been prepared for any other purpose. The learned Trial Judge expressly recognized that it was submitted in an effort to compromise a civil income tax liability and compounded the error of its admission when he stated:

> "Well, I don't see why a person wouldn't be required to tell the truth in compromising the civil liability just the same as they would the criminal liability."

and, again:

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"Well, when a person makes a statement for the purpose of getting an adjustment he is supposed to be telling the truth" (R. 393).

Again, Mr. Albert B. Maloney, a Certified Public Accountant with several years experience as an employee of the Department of Internal Revenue, testified that there was nothing unusual about a taxpayer offering a statement similar to plaintiff's Exhibit Number Eighteen in an effort "to compromise a tax claim" (R. pp. 425-426).

2. A Conflict Exists Between Various Circuits On Establishing Guilt by the So-Called "Net Worth Method."

In the case of Jacob Strauch, who was indicted for the years 1944, 1945 and 1946, the Government established the petitioner's net worth at the end of 1946 as being $113,043.99 (R. 495). The Government further showed that in May, 1940, Mr. Strauch had made an application for a loan with a Memphis bank, showing a net worth of $29,039.00 (R. 163). The Government then proved that for the years 1942 and 1943 this petitioner had reported for tax purposes on an income of $4,420.38 and $5,218.38, respectively (R. 197). However, their efforts to prove the petitioner's income for the years 1940 and 1941 wholly failed, and no evidence whatsoever was introduced as to the possible increase in wealth for these two years. Despite the failure to prove income for these years and, therefore, the consequent failure to prove net worth at the beginning of the tax period, the Court of Appeals rejected the petitioner's contention that all evidence of net worth should be stricken, and held that such evidence was "relevant and corroborating the Government's contention that income not reported by appellant Jacob Strauch was received in the taxable years" (Order of Court of Appeals, p. 2, Appendix, p. 21).

This holding reaffirmed the conclusion reached by the Sixth Circuit in the case of **Friedberg v. United States**, 207 F. 2d 777 (certiorari granted), holding that certainty of net worth at the beginning of the tax period is not necessary to sustain a conviction. It further placed the Court of Appeals for the Sixth Circuit in accord with the holding of the Ninth Circuit in the case of **Rimmer v. United States**, 205 F. 2d 277, wherein certiorari has also been granted. These two circuits are in square conflict, however, with the Court of Appeals for the Fifth Circuit which held in the case of **Bryan v. United States**, 175 F. 2d 223, 225:

> "The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate."

Also, the Court of Appeals for the Third Circuit, which held in the case of **United States v. Fenwick**, 177 F. 2d 488, 490, 492:

> "Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence.
>
> • • • • • • • •
>
> "Where there is uncertainty as to whether all the assets of the defendant are included in the Government's computation of net worth, it follows that its computations cannot be relied upon. Essential proof of no other assets is the cornerstone of the evidence of the Government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt."

The rule followed by the Sixth Circuit is inconsistent with the very recent holding of the Seventh Circuit in the

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case of **Demetree v. United States,** 207 F. 2d 892, 894, wherein the practice of sustaining convictions obtained by the net worth method received highly critical treatment in the following language:

> "This kind of latitudinous allowance of the admission and use of conclusions as evidence and the submission of the case to the jury without a scrupulous adherence to the theory, has resulted in a tendency to accept, if not in the complete acceptance of, the idea that in a case tried by this method, ordinary rules of proof may be relaxed if not disregarded. Further and more prejudicial to a defendant, there has grown up a kind of ancillary theory that the government, by introducing proof of deposits, expenditures, etc., having put up what it calls a prima facie case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the government establish his guilt by legal and credible evidence beyond a reasonable doubt. This is accomplished by requiring him to prove himself innocent by assuming the burden of overcoming the prejudicial effect of the mass of exhibits, estimates, conjectures, and conclusions which the government has been allowed to get into the record, upon the apparent theory that it is up to the defendant to explain all of it away as part of his burden to prove his innocence."

In view of the conflict of opinions between the various circuits and particularly in view of the fact that this Court has already recognized the conflict by granting the writ of certiorari in the **Rimmer case,** the **Friedberg case,** and the case of **United States v. Calderon** (C. A. 9), 207 F. 2d 377, all of which are now pending on the Court's docket, we respectfully submit that the writ should be granted in the cases at bar so that they may receive the same consideration as the other cases involving the identical question, and in which the writ of certiorari has already been granted.

3. The District Court's Charge Contained Plain Error Affecting Substantial Rights of the Petitioners.

As stated in the "Statement of the Case," the District Court instructed the jury as to both the maximum and minimum penalties prescribed by the statute in the event of a conviction and further cautioned the jury that should the petitioners be acquitted the Government could not review their action, the effect of which was to tell the jury that they could make no mistake by convicting the petitioners because the convictions could be set aside if the appellate court thought them to be erroneous. On the other hand, the Government could not correct any mistake made by the jury in the favor of the petitioners. It is true that the petitioners reserved no exception to this part of the Court's charge. The Court of Appeals with one Judge dissenting, found that this was not so plain an error as to require a reversal. The Court's refusal to reverse the action of the lower court in charging what sentence might be imposed in the event of a conviction is, we submit, in conflict with the holding of the Court of Appeals for the Fourth Circuit in the case of **Lovely v. United States**, 169 F. 2d 386, 391, wherein it was held:

> "And we think that error was committed to the prejudice of defendant when the jury was instructed that a person sentenced to life imprisonment was eligible to parole after fifteen years. The jury had nothing to do with the punishment of the defendant, except that under the statute they might decide whether or not he should be given capital punishment; and to charge as to eligibility for parole after fifteen years was to becloud the issue before them and open the way to a compromise verdict. What they were to decide was whether defendant was guilty or not and, if so, whether he should be given capital punishment. Whether he should be paroled after fifteen years, if not given capital punishment, was a matter which they could not decide and which should not have

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been called to their attention, even though they were told at the same time that they had nothing to do with it. See Ryan v. United States, 8 Cir., 99 F. 2d 864; Coward v. Com., 164 Va. 639, 178 S. E. 797."

The effect of this charge on the jury was most forcefully set out in the dissenting opinion of Judge Gourley which may be found in the appendix hereto, and particularly in the following language:

"I believe the error below is 'plain' within the meaning of the rule, and that it affects 'substantial rights.' I can perceive nothing more substantial than to have the members of the jury, in their deliberations, consider the fact that if a verdict of not guilty is returned, no right to appeal exists on the part of the Government, and to further consider the nature or extent of the punishment that the trial court could impose in the event of a verdict of guilty.

"Criminal jurisprudence has long recognized error and inherent danger to a fair trial when a jury is charged on the subject of punishment, and certainly, even more grievous error and peril to the impartial administration of justice would exist when reference is made to the Government's inability to appeal from a verdict of not guilty. **Ryan v. United States**, 8 Cir., 99 F. 2d 864; **Demetree v. United States**, 5 Cir., 207 F. 2d 892; 23 C. J. S., sec. 1290 (b), page 869; Housel and Walser, 2nd Ed., Defending and Prosecuting Federal Criminal Cases.

"When instructions have been made to a jury which should not be made, it is a question of judgment whether what was said was so prejudicial as to justify a reversal where the evidence is sufficient to support the conviction.

"I cannot conceive that the instructions made by the trial judge were not considered with some weight

in the determination of the guilt or innocence of the defendant.

"The administration of criminal justice in this democracy should not be subjected to the remotest hazard that a person be deprived of his liberty on any thoughts or ideas that do not relate directly to the facts as presented to establish a defendant's guilt."

CONCLUSION.

For the reasons stated, the petition for the writ of certiorari should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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APPENDIX.

Nos. 11,992, 11,993, 11,994

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Jacob Strauch, Appellant, v. United States of America, Appellee.	No. 11,992.
Alex Strauch, Appellant, v. United States of America, Appellee.	No. 11,993.
Harry Benjamin Sher, Appellant, v. United States of America, Appellee.	No. 11,994.

ORDER.

(Filed April 21, 1954.)

Before Allen, Circuit Judge, Starr and Gourley, District Judges.

This case came on to be heard on the record and briefs and oral argument of counsel;

And it appearing that in these cases, consolidated for trial by agreement of counsel, each case charging viola-

tions of 26 U. S. C., § 145 (b), appellant Jacob Strauch was indicted for wilfully and knowingly attempting to evade income taxes for the years 1944, 1945 and 1946, and appellants Alex Strauch and Harry Benjamin Sher were indicted for wilfully and knowingly attempting to evade income taxes for the years 1944 and 1945;

And it appearing that the jury found each appellant guilty as charged in the various indictments;

And it appearing that the net worth figures introduced by the government bearing on the charge against Jacob Strauch were relevant and corroborated the government's contention that income not reported by appellant Jacob Strauch was received in the taxable years;

And it appearing that appellants made no proposition to compromise their possible civil income tax liability and that **Ecklund v. United States**, 159 Fed. (2d) 81 (C. A. 6), does not control;

And it appearing that the Restatement of Partnership Income executed by all appellants, prepared for appellants at their own request, admitted that substantial variations existed between the Restatement and the income declared by appellants as partners in their tax returns for the years involved;

And no exception being taken to the charge of the court, the verdict being supported by substantial evidence and no reversible error existing in the record;

It Is Ordered that the judgments be and they hereby are affirmed.

Approved for entry:

/s/ Florence E. Allen,
United States Circuit Judge.

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Nos. 11992, 11993, 11994.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Jacob Strauch, Appellant, v. United States of America, Appellee.	No. 11992.
Alex Strauch, Appellant, v. United States of America, Appellee.	No. 11993.
Harry Benjamin Sher, Appellant, v. United States of America, Appellee.	No. 11994.

Decided June 17, 1954.

MEMORANDUM ON PETITION FOR REHEARING.

(Filed June 17, 1954.)

Before Allen, Circuit Judge, Starr and Gourley, District Judges.

Allen, Circuit Judge. This case is before the court upon petition for rehearing. Appellants urge (1) that the court erred in not holding the **Ecklund** case, 159 Fed. (2d)

81 (C. A. 6) controlling, and (2) that the judgment should be reversed because of prejudicial error in the charge of the trial court. The question whether the statement of income filed voluntarily by the three appellants constituted an offer of compromise was fully considered in connection with the hearing and we adhere to our conclusion that **Ecklund v. United States,** supra, does not govern this controversy. Under this record the statement filed was not an offer of compromise and was admissible.

The question whether the District Court erred in charging upon the subject of the penalty provided under § 145 (b) of Title 26 U. S. C. for willful attempt to evade or defeat income taxes was not considered in the trial but was raised at the hearing by one of the members of this court. This portion of the charge was included in the general charge, was not excepted to by able counsel nor attacked by them either in brief or argument upon the hearing in this court. The majority of the court thinks that the charge, the pertinent portion of which is given in the margain,[1] was not prejudicial. We think the state-

[1] "These indictments, ladies and gentlemen of the jury, were returned under Section 145 (b) of Title 26 of the United States Code, which provides, so far as it pertains to these charges, that any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

"Now, as the Court has charged you, your duties as jurors consist of a fact-finding body, and when you have reached a verdict in the case, either guilty or not guilty, then your duties are at an end. If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury. If your verdict is guilty, then, of course, it becomes the duty of the Court to pass sentence. You have nothing whatever to do with the fixing of any sentence in any case, but merely to hear the evidence in the case and determine from that evidence whether or not the charges are sustained, whether or not the defendant is guilty or not guilty.

"Now, as to the matter of the punishment provided by the statute, that means that the Court in passing sentence may fine the defendant any amount, according to the discretion of the Court, from one

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ment by the court, "If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury," was favorable to appellants and under the facts of this case it could not have induced a conviction. The three indictments set forth alleged income tax evasion for the taxable years, two of the appellants being charged with falsifying the income from a partnership of which all three appellants were members, and the third appellant being charged with failure to declare income from the partnership and also from an individual business which he owned. After the investigation of possible tax evasion began the three appellants voluntarily executed a statement setting forth material variations from the taxes reported by them in the taxable years and concerning these variations made the following statement:

> "This statement executed by Harry B. Sher, Alex Strauch and Jacob Strauch this 12th day of December, 1949:
>
> "Having re-examined, at the request of my counsel and auditors, the books and records of Strauch & Sher, a partnership, and having, pursuant to request, re-examined supporting memoranda with reference to sales and expenditures of the said partnership.
>
> "It is the opinion and belief of the undersigned that a corrected statement of income of the said partnership is properly reflected in the exhibit hereto at-

---

cent up to ten thousand dollars. There is not any definite amount fixed in the statute that the Court must fine the defendant. The statute says that 'Upon conviction thereof, the defendant may be fined not more than ten thousand dollars.' That means that the Court could fine him any amount from one cent to ten thousand dollars. 'Or imprisoned for not more than five years.' That means the Court could order him imprisoned for any length of time from one minute up to five years, according to the punishment that the Court might think is justified in this case. That does not mean that the Court has to impose a fine of ten thousand dollars or a sentence of five years, but leaves it to the discretion of the Court."

tached, entitled 'Restatement of Partnership Income,' and that taxable income of the undersigned should be appropriately computed as a result of the said restatement:

"Further, that the variations resulting from the totals reflecting in the said restatement from the income as reported by the individuals, or as set forth in explanatory comments heretofore submitted are attributable to error in maintenance of records and the classification of items of income and expense and are not attributable to intent on the part of the undersigned to defraud the government, or willfully, to evade the payment of any income taxes as and when due.

"This statement has been prepared at our request in conformance with information furnished by ourselves.

"/s/ Harry B. Sher,
/s/ Alex Strauch,
/s/ Jacob Strauch."

It was shown by this statement and the records of the partnership that all three appellants in the years 1944 to 1946, inclusive, received income on which they failed to pay a tax. The bank deposits of Jacob Strauch showed that he had received income in 1944, 1945 and 1946 from an individual jewelry business on which he did not pay a tax. The evidence upon these points was overwhelming. In the face of this evidence, much of it taken from appellants' own books of account, the jury found appellants guilty. We see nothing in the court's statement which can be construed as asking the jury to convict, and in addition we cannot conceive that under this record this portion of the court's instructions could have influenced the jury as to conviction. The lack of exception by experienced counsel and the total failure to argue at the hearing in this court the point now stressed strongly in-

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dicates that the error of the trial court, which is not to be commended, was not prejudicial. None of the cases relied upon are in point. In **Lovely v. United States,** 169 Fed. (2d) 386 (C. A. 4), serious error to the prejudice of the defendant was committed in the admission of testimony. Also the court in explaining that the sentence carried a life penalty stated that the defendant was eligible to parole after fifteen years. In **Demetree v. United States,** 207 Fed. (2d) 892 (C. A. 5), the jury repeatedly reported that it was unable to agree upon a verdict and finally asked the judge to state what the punishment would be. The judge assured the jury that the maximum sentence would not be imposed. These cases afford no assistance in solving the problem presented here.

The majority of the court concludes that, as no prejudicial error existed in the conduct of the trial nor in the charge of the court, the petition for rehearing must be denied.

DISSENTING OPINION.

Gourley, District Judge. In these criminal appeals from a jury verdict of guilty, I joined in a per curiam order affirming the judgments of the District Court since I believed substantial evidence existed to support the verdicts. I was also of the opinion, and continue to so believe, that no error existed in the record to which objection was made or exception taken. There was no basis to sustain any of the assignments of error presented by the defendants in their appeal.

Nevertheless, during the argument of the appeal, I noticed what I considered "plain error" in the charge of the trial judge which I believed affected substantial rights of the defendants.

The following portion of the District Judge's charge to the jury, in my judgment, poignantly poses the question of "plain error."

> "These indictments, ladies and gentlemen of the jury, were returned under Section 145 (b) of Title 26 of the United States Code, which provides, so far as it pertains to these charges, that any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> "Now, as the Court has charged you, your duties as jurors consist of a fact-finding body, and when you have reached a verdict in the case, either guilty or not guilty, then your duties are at an end. **If your verdict is not guilty then that is the end of the case. The Government can't appeal from that verdict by the jury.** If your verdict is guilty, then of course it becomes the duty of the Court to pass sentence. You have nothing whatever to do with the fixing of any sentence in any case, but merely to hear the evidence in the case and determine from that evidence whether or not the charges are sustained, whether or not the defendant is guilty or not guilty.
>
> "Now, as to the matter of the punishment provided by the statute, that means that the Court in passing sentence may fine the defendant any amount, according to the discretion of the Court, from one cent up to ten thousand dollars. There is not any definite amount fixed in the statute that the Court must fine the defendant. The statute says that 'Upon conviction thereof, the defendant may be fined not more than ten thousand dollars.' That means that the Court could fine

him any amount from one cent to ten thousand dollars. 'Or imprisoned for not more than five years.' That means the Court could order him imprisoned for any length of time from one minute up to five years, according to the punishment that the Court might think is justified in this case. That does not mean that the Court has to impose a fine of ten thousand dollars or a sentence of five years, but leaves it to the discretion of the Court" (R. 485-486).

The question of plain or substantial error was not argued and counsel for the litigants were not prepared to enlighten the court on applicable principles of law.

Opportunity has now existed for an independent research and more reflected judgment to be made of the law, and I am now convinced that substantial or plain error does exist which materially affected the rights of the defendants.

I must, therefore, vacate my joinder in the per curiam order of affirmation and respectfully dissent to the judgment of my learned colleagues.

It is incumbent upon this court to take notice of substantial or plain error, whether or not such error was raised by counsel at time of trial or laid as an assignment of error in appeal.

The law provides an impenetrable cloak of protection about a defendant in a criminal proceeding which requires the court of appeals, in cases of serious criminal offenses to carefully check the record for error prejudicial to defendant, whether such error had been urged upon the court or not. **Tatum v. United States**, 3 Cir., 190 F. 2d 612.

Undoubtedly, as a matter of administrative policy, to avoid any unnecessary appeals and new trials, it is important that errors, which inevitably will occur from time to time in extemporaneous charges of the most competent

judges, be pointed out immediately by trial counsel with a view to their correction then and there. That policy is enforced in many cases by refusal to review for defects in a charge not challenged at the trial. Indeed, the silence of counsel often suggests that errors seem trivial at that time. But where, particularly in a criminal case, several errors appear, which in the aggregate contain the potential of substantial damage to the accused, the policy of sound and time saving trial administration which would penalize failure to point out error below may have to yield to more important considerations of making sure that the accused has been treated fairly. **United States v. Cumberland,** 3 Cir., 200 F. 2d 609; **Miller v. Commonwealth of Ky.,** 6 Cir., 40 F. 2d 820; **Morris v. United States,** 9 Cir., 156 F. 2d 525; **United States v. Raub,** 7 Cir., 177 F. 2d 312; **Logan v. United States,** 5 Cir., 192 F. 2d 388; **Wyche v. United States,** CCA D.D., 193 F. 2d 703; **Apodaca v. United States,** 10 Cir., 188 F. 2d 932; **Rose v. United States,** 10 Cir., 128 F. 2d 622; **Remmer v. United States,** 9 Cir., 205 F. 2d 277.

Thus, the question is resolved as to whether the error committed was of so fundamental a nature that the court of appeals should exercise the power provided by Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.

I believe the error below is "plain" within the meaning of the rule, and that it affects "substantial rights." I can perceive nothing more substantial than to have the members of the jury, in their deliberation, consider the fact that if a verdict of not guilty is returned, no right to appeal exists on the part of the Government, and to further consider the nature or extent of the punishment that the trial court could impose in the event of a verdict of guilty.

Criminal jurisprudence has long recognized error and inherent danger to a fair trial when a jury is charged on

the subject of punishment, and certainly, even more grievous error and peril to the impartial administration of justice would exist when reference is made to the Government's inability to appeal from a verdict of not guilty. **Ryan v. United States,** 8 Cir., 99 F. 2d 864; **Demetree v. United States,** 5 Cir., 207 F. 2d 892; 23 C. J. S. § 1290 (b) page 869; Housel and Walser, 2nd Ed., Defending and Prosecuting Federal Criminal Cases.

When instructions have been made to a jury which should not be made, it is a question of judgment whether what was said was so prejudicial as to justify a reversal where the evidence is sufficient to support the conviction.

I cannot conceive that the instructions made by the trial judge were not considered with some weight in the determination of the guilt or innocence of the defendant.

The administration of criminal justice in this democracy should not be subjected to the remotest hazard that a person be deprived of his liberty on any thoughts or ideas that do not relate directly to the facts as presented to establish a defendant's guilt.

I, therefore, respectfully dissent from the judgment of my distinguished colleagues and believe that a new trial should be awarded and the proceeding remanded to the District Court.

Since the formulation of the within dissent, defendants have made application to the court for rehearing and for the reasons herein stated, I believe rehearing should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 215

JACOB STRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ALEX STRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

HARRY BENJAMIN SHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the *per curiam* order of the Court of Appeals affirming the judgments of the District Court (Pet. 21-22), nor the memorandum (Pet.

23-27) and dissenting opinion (Pet. 27-31) on the petition for rehearing has been reported.

JURISDICTION

The order of the Court of Appeals was entered April 21, 1954 (Pet. 21-22), and a petition for rehearing was denied on June 17, 1954 (Pet. 23-27). The petition for certiorari was filed on July 15, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37(b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether a statement of income, which had been submitted in an effort to settle civil tax liabilities, was admissible in a prosecution for invasion of income taxes.

2. Whether the trial court erred, as to petitioner Jacob Strauch, in denying a motion to strike evidence of increases in his net worth.

3. Whether, despite the absence of an objection, certain language of the trial court's charge to the jury, stating the maximum and minimum penalties under the statute and remarking that the Government could not appeal, constituted plain error requiring a reversal of the convictions.

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 145.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may as-

sign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On April 2, 1951, a three count indictment was returned in the United States District Court for the Middle District of Tennessee against petitioner Jacob Strauch. (R. 5-7.) On the same day, indictments in two counts were returned against petitioners Alex Strauch and Harry Benjamin Sher. (R. 7-10.) These indictments charged Alex Strauch and Sher with attempts to defeat and evade their income taxes for the years 1944 and 1945, and Jacob Strauch with the same offense for the years 1944, 1945, and 1946, all in violation of Section 145 (b) of the Internal Revenue Code.

The amounts of net income and taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Jacob Strauch				
Count I (1944)	$ 9,478.94	$ 2,392.21	$32,012.76	$14,793.29
Count II (1945)	.....	.....	.....	25,471.71
Count III (1946)	16,922.27	4,905.30	35,000.36	14,986.47
Alex Strauch				
Count I (1944)	$ 5,298.50	$ 1,061.57	$25,158.30	$10,393.15
Count II (1945)	4,776.50	919.13	18,785.42	6,641.27
Harry Sher				
Count I (1944)	$ 2,727.69	$ 452.00	$19,760.79	$ 7,446.04
Count II (1945)	2,542.49	410.00	13,935.79	4,420.46

The case was tried from April 20 to April 29, 1953. (R. 72.) At the conclusion of all the evi-

dence the jury deliberated one hour and a half and found petitioners guilty on all counts. (R. 488.) Alex and Jacob Strauch were fined $5,000 and sentenced to three years imprisonment on each count, the sentences to run concurrently, while Sher was fined $5,000 and sentenced to four years imprisonment on each count, the sentences to run concurrently. (R. 493-494.) Petitioners' motion for a new trial was denied on June 19, 1953. (R. 538.) The Court of Appeals affirmed the decision. (R. 597-605.)

The evidence to support the verdict may be summarized as follows:

Petitioners were partners in a wholesale jewelry business during the period here involved. (R. 81-82, 90, 346-349.) Since they dealt largely in the black market a great proportion of their business was transacted in currency. (R. 102, 404, 417-418.) Sales were made to post exchanges and jewelry stores in the neighborhood of camps and, according to petitioners, the business was closed when this market dried up at the end of the war. (R. 348-350, 364, 372.) Records of purchases and sales were kept until November 7, 1945. After that, only purchases were recorded, the last entries being on August 19, 1946. (R. 88-93, 395-396.) No income tax returns were ever filed by the partnership. (R. 115.) Both Jacob Strauch and Alex Strauch also had individual jewelry businesses of their own (R. 221, 223, 227).

An examination of the books of the partnership revealed that the distributive shares of each part-

ner amounted to approximately $19,859 in 1944 and $14,000 in 1945. (R. 204-217.) When confronted with these figures from their own books, all three partners admitted that they had not reported any of this income, although Alex Strauch and Sher later stated that they had reported some of it. (R. 217.) Using the figures shown by the books the Government demonstrated that the following amounts of net taxable income had been omitted from the returns of Alex Strauch and Sher.[1] (R. 217-227):

	Alex Strauch	Sher
1944	$20,359.80	$17,033.10
1945	14,008.92	11,390.30

In addition to the unreported income appearing upon the face of the books, there was evidence of large distributions to the partners which either did not appear on the books or had been entered as expenditures. Thus, on January 9, 1945, three checks to cash were drawn in odd amounts but totaling exactly $30,000. They were not entered in the book recording expenditures, although according to the checks and the stubs they represented payments for merchandise which had been purchased by the partnership.[2] The checks were cashed by the partners. (R. 256-259, 400-404.)

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[1] As will be observed, by comparison with the figures in the indictment (*supra*, p. 4), the Government proved almost exactly the amounts alleged.

[2] Sher, who kept the books, testified that all purchases were recorded in the books. (R. 351, 417.)

There were other similar instances. (R. 389-400.)

There was further evidence as to petitioner Jacob Strauch who had been indicted for 1946, as well as 1944 and 1945. Jacob Strauch gave the agents very few of the records of his individual business, but he told them that all the deposits in his bank accounts represented receipts from his business. (R. 227-228, 266-267, 269-270, 272, 296-297, 300, 303-304.) The agents, therefore, subjected the bank deposits to a careful analysis, the results of which are not challenged in the present petition, and determined that Jacob Strauch had failed to report the following amounts of taxable net income.[3] (R. 229-232, 236-255; see particularly R. 251-255):

1944	$22,533.82
1945	49,018.91
1946	18,078.09

In addition, the Government made an effort to show increases in Jacob Strauch's net worth between 1940 and 1946. (R. 103-105, 161-163, 495-496.) Eventually, the Government had to abandon this method of proof when it could not properly account for the years 1940 and 1941. (R. 196-201, 325.) It was made clear to the jury by the discussion of the court and counsel and by cross-examination of a Government witness that the net worth computation would be unsatisfactory if the

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[3] Again, the figures coincide very closely with those alleged in the indictment. (*Supra*, p. 4.)

Government could not account for all the years involved, and counsel for the defense fully understood that this part of the Government's case had been abandoned. (R. 105, 111-115, 162-163, 199-200, 325, 549, 556-557.) Although a motion to strike the net worth evidence was made and denied after the direct examination of the last prosecution witness (R. 259-260), the motion was not renewed when the Government finally rested (R. 323-329) and there was no request by the defense that the court, in its charge, instruct the jury to disregard such evidence (R. 477-478, 488).

ARGUMENT

As must be obvious from the above Statement, the Government's main proof of unreported partnership income, and in fact its main proof in the case, was derived directly from the very figures recorded in the partnership books.[4] In addition evidence was presented from which it could be concluded that a $30,000 distribution of profits in 1945 had been entered in the books as expenditures.[5] (*Supra*, p. 6.) Petitioner Jacob Strauch's income from his own individual business was proved by an analysis of his bank deposits. (*Supra*, p. 7.) An effort to corroborate this by a computation of the increases in Jacob Strauch's net worth was not fully successful and was not pushed.

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[4] See R. 178-179, 199, 234, 259, 325, 556.

[5] Other instances of this nature, including the one of which petitioners complain (Pet. 5-6, 12), did not come into evidence until the cross-examination of petitioner Sher (R. 384-400).

(*Supra*, pp. 7-8.) Petitioners do not challenge the main proof against the partnership or the main proof against Jacob Strauch, but the petition gives the impression (Pet. 5-9, 11, 15) that the Government's subordinate methods of proof were all it had.

1. In December 1949, over three years after the revenue agents had begun their investigation,[6] petitioners' attorneys came to Washington in an attempt to effect a settlement of their civil tax liabilities. (R. 387-389.) They submitted a "Restatement of Partnership Income" for the period from 1943 to 1946, inclusive. (R. 496-498.) The document was signed by petitioners and contained the following language (R. 497):

> It is the opinion and belief of the undersigned that a *corrected statement of income* of the said partnership is *properly reflected* in the exhibit hereto attached, * * * and that taxable income of the undersigned should be *appropriately computed* as a result of the said restatement; * * *. [Emphasis supplied.]

One of the items was a distribution of profits on September 3, 1943, in the amount of $3,000. (R. 498.)

During cross-examination of petitioner Sher, the witness' attention was directed to an entry in the books showing a payment of $3,000 to the part-

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[6] The investigation was begun in September, 1946 (R. 99, 330, 331).

ners on September 3, 1943, as traveling expenses. Sher testified that the entry was correct, and he was then confronted with the statement submitted in Washington. (R. 384-393.) The defense duly objected, and petitioners now contend (Pet. 11-15) that the statement was an offer in compromise and that it was erroneously admitted in evidence.

The simple answer is that the statement was more than an offer in compromise. It was, as the prosecution argued to the trial judge, a confession or a statement of fact to support an offer in compromise. (R. 387, 393, 571-573.) It was a statement of what petitioners contended were the true facts, and it was submitted as an offer to pay what petitioners admitted was actually due.[7]

It is elementary that any rule excluding offers in compromise refers to the actual offer, and not to the admission in evidence of particular facts or circumstances. IV Wigmore, Evidence (3d ed., 1940, Sec. 1061(*c*); see also Section 1048(1)(b). The case upon which petitioners rely,[8] and which likewise was decided by the court below, is not relevant, for there the Government relied on the actual settlement of a civil case, not the admission of a fact as an incident to settlement negotiations. Furthermore, petitioners were well aware that a special agent had been working on the case for

[7] The statement of counsel (R. 387-388) upon which petitioners rely (Pet. 14) was not evidence. Regardless of the manner in which the statement was prepared, it was signed by petitioners as properly reflecting their true income. (R. 497.)

[8] *Ecklund* v. *United States*, 159 F. 2d 81.

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about two and a half years (R. 201-204), and their effort to make a payment at this late stage provided some evidence of an attempt to fend off criminal proceedings. Cf. *United States* v. *Stoehr*, 196 F. 2d 276, 282-283 (C. A. 3d), certiorari denied, 344 U. S. 826.

2. It is urged (Pet. 15-17) that the evidence as to the increase in Jacob Strauch's net worth should have been stricken. The trial court, holding that this evidence was a relevant and corroborative circumstance, refused to grant a motion to strike made at the end of the direct testimony of Agent Norris. (R. 259-260.) The motion was not thereafter renewed and no special instruction on the subject was requested. There is no merit in the present argument. Petitioners suffered no prejudice even if the ruling were erroneous.

Alex Strauch and Sher were obviously not affected by evidence of an increase in Jacob Strauch's net worth, and the record affirmatively demonstrates that he himself was not prejudiced thereby. The net worth evidence would at most have supported the Government's analysis of Jacob Strauch's bank deposits. It revealed an increase of approximately $84,000 in his net assets between May 1940 and November 1946 (R. 103-105, 163, 495), whereas the bank deposits analysis, the validity of which is unchallenged here, disclosed an even greater amount of unreported income for the 1944-1946 period alone (*supra*, p. 7). Moreover, it must have been clear to the jury, from the discussions between the court and counsel and the

cross-examination of Agent Simpson (*supra,* pp. 7-8), and from the failure of the Government to renew its abortive efforts to account for the years 1940 and 1941 (R. 197-201), that the net worth evidence was an insufficient basis, in itself, upon which to return a verdict of guilty. No specific charge was requested, but the jury was instructed at length on the general subject of circumstantial evidence. (R. 480-482.) Finally, it would appear that the prosecutor did not even mention the matter in argument to the jury, for the trial judge twice made the statement during proceedings on the new trial motion, without challenge by the defense, that the Government had abandoned the net worth theory. (R. 549, 557.)

Furthermore, the trial court's ruling was correct. As long as the Government's other evidence established a *prima facie* case, the jury could weigh the corroborative effect of the net worth increases, even though that alone would be an insufficient basis for conviction. This same issue is pending before this Court in No. 209, this Term, *Beaty* v. *United States,* on petition for a writ of certiorari, where the United States also opposed the granting of the writ. If petitioners had requested a limiting instruction it is quite clear that it would have been granted.[9] (R. 557.)

3. During the charge to the jury (R. 478-487)

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[9] The cases upon which petitioners rely (Pet. 16-17) are not in point since in all of them the Government was forced to rely almost entirely upon the net worth method to prove unreported income.

the trial judge, in explaining the offense alleged in the indictment, read the last portion of Section 145(b) (*supra*, pp. 2-3) including the penalty imposed. He told the jury that their duties ceased upon return of the verdict; that the case would end if they found petitioners not guilty since the Government could not appeal; and that it was the duty of the court to impose sentence if they returned a guilty verdict. He then explained the maximum and minimum sentences which he might in his discretion impose, but without in any way committing himself. (R. 485-486.) There was no objection (R. 488), and the matter was not even noticed until one of the circuit judges raised it during oral argument before the Court of Appeals (Pet. 27). Petitioners, adopting the argument of the dissenting judge below, now contend (Pet. 18-20) that this part of the charge constituted reversible error.

We submit that the mere statement of the allowable maximum and minimum penalties, buried in the context of the court's general charge and without any intimation of prospective severity or lenience, can have had no possible effect upon the jury's verdict. The cases upon which petitioners rely are readily distinguishable. In *Demetree* v. *United States*, 207 F. 2d 892, 895 (C. A. 5th), the jury, after informing the trial judge that they were deadlocked, received assurance that the punishment would be lenient. And in *Lovely* v. *United States*, 169 F. 2d 386, 391 (C. A. 4th), a rape case in which the jury were at liberty to impose capital

punishment, an instruction was given that the defendant would be eligible to parole in fifteen years if sentenced to life imprisonment.

The trial court's comment on the non-appealability of a not guilty verdict is not clearly prejudicial to the petitioner. But even if it be subjected to criticism, still it is not so manifestly erroneous as to call for a reversal. This is clearly a case which falls within the prohibition of Rule 30. (*Supra*, pp. 3-4.) As the Court of Appeals for the Seventh Circuit said recently in *United States* v. *Furlong*, 194 F. 2d 1, 3, certiorari denied, 343 U. S. 950:

> [Rule 30] is intended to prevent a litigant from taking advantage, after verdict, of the giving of an erroneous instruction to which he failed to call attention in time to afford the court an opportunity to correct it.

The "plain error" rule may not be invoked under such circumstances as those presented by the present record. See *Ryan* v. *United States*, 99 F. 2d 864, 865 (C. A. 8th), certiorari denied, 306 U. S. 635; *Goldstein* v. *United States*, 73 F. 2d 804, 806-807 (C. A. 9th).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1954.

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IN THE

Supreme Court of the United States

October Term, 1954 No. 249

LESTER H. BURDICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1954. No. .

LESTER H. BURDICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lester H. Burdick, petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered July 1, 1954, affirming petitioner's conviction of income tax evasion.

OPINIONS BELOW.

The opinion of the United States District Court for New Jersey is unreported. The opinion of the United States Court of Appeals for the Third Circuit has not been reported as yet. A copy of its opinion appears in the appendix at page 28.

JURISDICTION.

The jurisdiction of this Court is invoked under Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. A., Section 1241, (1). The order and judgment of the Court of Appeals for the Third Circuit was entered on July 1, 1954. A copy of its judgment appears in the Appendix at page 39.

The decision of the Court of Appeals in the instant case is squarely in conflict with decisions in at least three other circuits holding that where the prosecution attempts to establish an understatement of income of defendant by the net worth-expenditures method, the case should not be submitted to the jury if the starting point net worth is not definitely established.

In *Calderon v. United States*, 207 F. 2nd 377 (C. A. 9), Certiorari allowed, the Court held, inter alia; "The burden of proof is on the prosecution as to each pertinent starting item of the net worth statement to a reasonable certainty. Absent such a starting item as, say, Cash on Hand, the remainder of the statement proves nothing" * * * "The only other evidence showing the charged understatements consists of Calderon's verbal statements to the tax officials and to his bookkeeper. A fortiori since such written statements are extra-judicial, these verbal statements are. They

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cannot be the basis of a conviction absent, as here, some independent proof of the corpus delicti." *Spriggs v. United States* (C. A. 9), 198 F. 2nd 782; *United States v. Chapman* (C. A. 7), 168 F. 2nd 997, 1001, Certiorari denied, 335 U. S. 583.

Cases that are in agreement with the *Calderon* case are *Bryan v. United States*, 175 F. 2nd 223 (C. A. 5), *Demetree v. United States*, 207 F. 2nd 892 (C. A. 5), *Pollock v. United States*, 202 F. 2nd 281, 284 (C. A. 5), and *Fenwick v. United States*, 177 F. 2nd 488 (C. A. 7) .

Cases that are in conflict and disagreement with the instant case and the *Calderon* case are *Schuerman v. United States*, 174 F. 2nd 397 (C. A. 8), Certiorari denied, 338 U. S. 831, *Leeby v. United States*, 192 F. 2nd 331 (C. A. 8), *Bell v. United States*, 185 F. 2nd 302 (C. A. 4), Certiorari denied, 340 U. S. 930, *Brodella v. United States*, 184 F. 2nd 823, and *Graves v. United States*, 191 F. 2nd 579 (C. A. 10). These cases appear to hold that where some discrepancies appear between the defendant taxpayer's income tax return and his actual income or receipt of funds, the burden of proof shifts to the taxpayer to show that the discrepancies or additional receipts are not taxable income.

The several questions raised in this petition are of substantial importance, specifically, at least, in the interpretation, administration and enforcement of the Federal Internal Revenue statutes and income tax laws.

These questions as to the right of the government to use the net worth-expenditures method as a basis for income tax evasion prosecutions, and to the practice of the special agents of the Intelligence Unit and Revenue agents, when engaged in Criminal fraud investigations, in not giving taxpayers the benefit of their constitutional privileges by not warning them that whatever information they may give the agents might be used against them in a criminal proceeding, are arising quite frequently among the various District Trial Courts. As there are conflicts and disagreements and lack of uniformity in the lower Courts as to

them it is respectfully submitted that it is now necessary for a clarification of the issues by this Supreme Court.

Other reasons for granting the writ are those pertaining to the proper use and interpretation of the word "willfully" as used in the prosecuting statute, and the judicial determination relating to the conduct of the United States Attorney during the trial of the case.

It is contended by the petitioner that he did not have, and the government did not prove that he had, an evil motive or bad purpose in his actions. That the Court below should have approved a directed judgment of acquittal on this ground, alone. Further, that the Court below should have approved a request by petitioner for a mistrial and ordered a new trial due to the prejudicial conduct of the United States Attorney. That the trial Judge's admonitions to the jury were not sufficient and the evil influence upon the jury of these acts of misconduct was not removed by such judicial action as taken.

QUESTIONS PRESENTED FOR REVIEW.

1. In this instant case, an income tax evasion prosecution based on unexplained increases in net worth; (a) Must the government establish properly and sufficiently the taxpayer's basic net worth at the beginning of each of the taxable years involved to present an issue to the jury,? (b) Must the government prove each pertinent item of its net worth statement at the starting point of each of the years involved to a reasonable certainty,? and, is there independent third party evidence of a beginning net worth and yearly thereafter, required, and if so, was there such evidence presented by the government in this case, particularly as to cash currency on hand, real estate, life insurance and United States War Savings Bonds?

2. In an income tax evasion prosecution is the government required to prove the corpus delicti or some substantial portion thereof by independent evidence before the defendant's extra-judicial admissions may be introduced as evidence against him?

3. Was there sufficient evidence to support the Court below in its refusal of petitioner's motions for directed judgments of acquittal, particularly as to lack of willfulness?

4. Was there sufficient evidence to support the Court below in its refusal to grant defendant's motion to suppress the use as evidence against defendant the net worth statement, records and oral admissions given to and made to Special Agent Gerson and Internal Revenue Blackman at and between their first two conferences on November 6, 1951, and in January, 1952?

5. Should the Court below have granted petitioner's motions for withdrawal of a juror, which motions were based upon the United States Attorney's remarks and conduct?

STATUTES AND CONSTITUTIONAL AMENDMENTS INVOLVED.

Section 145 (b) of the Internal Revenue Code, 26 U. S. C. Section 145 (b).

This section provides: "Any person required under this chapter to collect, account for, and pay over any tax imposed by this Chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any per-

son who wilfully attempts in any manner to evade or defeat any tax imposed by this Chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution.

The Fourth Amendment to the Constitution of the United States, provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and particularly describing the place to be searched, and the persons and things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 3614 (a) of the Internal Revenue Code, 26 U. S. C. A. section 3614 provides:

> *"Examination of Books and Witnesses*
>
> (a) To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the cor-

rectness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the matter required by law to be included in such return, with power to administer oaths to such person or persons."

Section 3761 (a) of the Internal Revenue Code, 26 U. S. C. A. section 3761 (a) provides:

"Compromises

(a) Authorization. The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense: and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

STATEMENT OF THE CASE.

This is a petition for a Writ of Certiorari relating to a decision of the Court of Appeals for the Third Circuit which affirmed a judgment of the United States District Court for the District of New Jersey, entered on May 19, 1953, convicting petitioner of alleged violation of Section 145 (b) of the

Internal Revenue Code, 26 U. S. C. A. 145 (b) on all five counts of the indictment.

The indictment of petitioner was found by a Grand Jury of the United States District Court for New Jersey on or about September 11, 1952, and entered of record in the Court Records on September 17, 1952.

The government filed a Bill of Particulars indicating its case was based upon the net worth—expenditures method in arriving at the petitioner's correct taxable income.

The jury disagreed in the first trial of defendant and on April 20, 1953, the cause came on for a second trial before Honorable Phillip Forman, Chief District Judge and a jury at Camden, New Jersey. At the beginning of the trial petitioner's counsel moved for suppression of evidence procured by the government's agents from the petitioner in violation of his constitutional rights as provided by the Fourth and Fifth Amendments. The motion was ordered "Held" by the Court and the trial proceeded.

During the government's presentation of its case, the petitioner, through his attorney, moved, on various different occasions, for a mistrial, based upon the actions and statements of the United States Attorney. After admonishing the United States Attorney on these occasions, the Court refused to grant a mistrial.

Also, during the prosecution of the government's case, the Petitioner objected to the admission of the government agents' testimony and use of petitioner's net worth statement, and at the close of the government's case, petitioner moved again for a suppression of evidence and for a directed judgment of acquittal which were denied by the Court.

During the petitioner's presentation of his defense, his attorney, at least twice, moved for a mistrial, due to the United States Attorney's conduct, which was denied by the Court.

After the end of petitioner's case his attorney again moved for a suppression of evidence and for a directed

judgment of acquittal, which were denied by the Court. Petitioner's attorney also asked for a mistrial, due to the United States Attorney's remarks in his summation to the Jury, which were detrimental and prejudicial to petitioner, which was denied.

Petitioner was found guilty on all five counts and sentenced to jail for a year and a day on each of them, the sentences to run concurrently.

The petitioner during the period involved was employed as an executive clerk of the New Jersey State Senate when it was in Session and also did public relations work and sold radio advertising time. The latter activities were conducted from his home and by automobile. Petitioner had no accounting or tax experience.

Shortly before November 6, 1951, Special Agent Gerson of the Intelligence Unit, Bureau of Internal Revenue, United States Treasury Department, was assigned by his superior to make a criminal investigation of the income tax returns of petitioner for the taxable years 1946 to 1950, inclusive, based upon allegation of evasion of income tax. Special Agent Gerson arranged for an interview at the Internal Revenue Agents' office in Atlantic City, New Jersey, with petitioner for November 6, 1951, and notified him or Mrs. Burdick by telephone, that it was not necessary for petitioner to bring in any records at that meeting, it being just an informal meeting.

The petitioner appeared before Special Agent Gerson, as arranged, together with Mr. Leonard Willets (a former Internal Revenue Agent) who had assisted petitioner in making out his income tax returns. Special Agent Gerson introduced himself to them, stating he was a special agent attached to the Intelligence Unit in Philadelphia, and that petitioner could answer any questions he wanted, or he could refuse; that anything petitioner cared to give him would be voluntary. Petitioner offered to cooperate with the Bureau in any way he could. Special Agent Gerson did not tell him he was engaged in a criminal investigation or

that any information he gave him might be used against him in a criminal proceeding.

Petitioner had with him, at this meeting, his bank statements and cancelled checks for all the years involved and turned them over to Special Agent Gerson at his request. The cancelled checks indicated the persons, banks, companies, and corporations with whom he did business; his stock brokers, his and Mrs. Burdick's real estate and mortgage transactions; and his personal and business expenditures.

Special Agent Gerson questioned petitioner as to what records he kept and petitioner told him he didn't keep any formal records. That he did, however, keep memorandum and notes which he destroyed at the time he filed his return or shortly thereafter. Mr. Gerson then asked him for a net worth statement which would show his net worth as of January 1, 1946, and December 31, 1950. Petitioner, together with Mr. Willets, prepared such a statement and gave it to Mr. Gerson on November 21, 1951. The statement was headed "Lester H. Burdick" and at the bottom of the statement and above petitioner's signature was typed "The above statements reflect my net worth as of January 1, 1946 and December 31, 1950." It was sworn to by Petitioner. It was introduced in evidence by the government over objection as "Exhibit G-6" and the government based its case upon it.

There were only seven items of assets in the statement. One as to cash, two as to life insurance, and one each as to a savings account, securities and an auto. The items in dispute are as to cash currency on hand, life insurance in Mrs. Burdick's name, securities being United States War Savings Bonds in the name of Lester H. and Irene L. Burdick, and real estate in Mrs. Burdick's name.

There was an item of "cash" as of January 1, 1946 in the amount of $5,888.25, of which $1,888.25 was the balance of a bank account. The balance of $4,000.00 was what petitioner told the government agents in their examination of him he had at home and saved in prior years. The govern-

ment did not admit this cash of $4,000.00 at the time of indictment but did accept that the petitioner had it at the time stated by him, when the trial commenced. It did not present any independent evidence of what cash currency the petitioner had or could have had on hand as of January 1, 1946.

The listed item of life insurance which was in the name of Mrs. Burdick was included by the Agents because petitioner had listed it. The agents did not verify this item or the life insurance items of petitioner. They accepted his statements and at the trial no independent evidence of them was presented by the government.

The item of United States War Bonds was not listed by the petitioner in his net worth statement, although he did list securities at $3,000 for a starting point. The agents disallowed this item but charged petitioner with war savings bonds purchased in 1946, 1947 and 1948 and sold in 1948. The agents testified they did not know who purchased these bonds but they received a list from the United States Treasury Department in which they were listed in the names of Lester H. and Irene L. Burdick. Further that the bonds had been sold in 1948 at the Guarantee Trust Company, Atlantic City, being endorsed by Lester H. Burdick and the check for the proceeds being in petitioner's name, endorsed by him, and deposited in his bank account.

George Oberholtzer, a witness for petitioner, testified at the trial that he was an employee of the Post Office in Atlantic City and that Mrs. Burdick had purchased these bonds from him and had the bonds put in both names on his advice. The government did not present any other proof as to the purchase and ownership of these bonds.

The listed item of $1,750.00 for real estate in the starting point was a lot of land petitioner had purchased in 1944 and given his wife as a gift. The deed was in her name and so recorded. It was sold on July 3, 1948 for $5,500.00 and reported by petitioner and his wife in their 1948 joint income tax return.

The listed item of real estate, $22,500.00 in 1948 in the government's net worth is for the Burdick home purchased on June 15, 1948. The deed for this property is in the name of Irene L. Burdick and is so recorded. Petitioner stated it was paid for by the sale of his wife's war savings bonds and lot plus a $15,000 mortgage executed by both of them. Petitioner had also borrowed at this time $3,000.00 from a bank which funds were also available.

The government offered no independent evidence of the ownership of the life insurance, bonds and real estate but depended on petitioner's extra-judicial admissions for proof of same. The revenue agent stated he put them in petitioner's net worth as petitioner had included them in his net worth statement.

Petitioner testified he believed he was filing a joint net worth statement because Special Agent Gerson told him to "put everything in" and also because he and his wife had filed joint returns in 1948 when the lot was sold, and had filed joint returns in 1949 and 1950.

Petitioner included in his net worth statement as a liability as of December 31, 1950, a "loan payable" of $1,000. This being for money borrowed from a friend and which was lost on bets at a race track. The government agent disallowed the loan stating it was a gambling loss and not an allowable deduction.

Petitioner testified that he had informed the agents during his examination that his mother died in late 1946 and in going through her trunk in early 1947, he found $1,600.00 which he kept and used. Also that his wife had money of her own at home. The agents ignored these items and never questioned Mrs. Burdick or attempted to prove Mr. Burdick had not received any inheritances.

Petitioner had informed the government's agents, during their investigation, that he had received some monies from various persons which he had considered as gifts and did not, therefore, report them as taxable income. The agents did not investigate the correctness or falseness of these transactions or their true nature.

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ARGUMENT.

The government's net worth statement, including its starting point, was incorrect.

It is a well-established rule of federal criminal law that where the government's case rests on circumstantial evidence, such evidence may be the basis for a conviction only if the evidence is inconsistent with innocence and excludes every reasonable hypotheses except that of guilt. *Stubbs v. United States*, 2 F. 2nd 468 (C. A. 4).

With these determining points in mind, many of the appellate courts have held with uniformity that where the government relies on increase in net worth plus expenditures to prove unreported income, its case would fail if its basic premises, namely, that the net worth of the defendant at the beginning point of the period involved is not correct. *United States v. Chapman* (C. A. 7) 168 F. 2nd 997; *Bryan v. United States* (C. A. 5) 175 F. 2nd 223, 224, and *United States v. Fenwick* (C. A. 7) 177 F. 2nd 488.

To establish a correct beginning or starting point, the calculation must of course include all of the defendant's assets. It cannot include those of a third party, particularly that of his wife, who is not a party to the indictment.

It is contended that this is what the government has done to procure a conviction in the instant case. In its net worth starting point of December 31, 1945, it has included Mrs. Burdick's real estate and life insurance and in the following years it has included them in addition to her war savings bonds in the names of Lester H. and Irene L. Burdick (p. 263a).

It is submitted the government never proved, by competent evidence, that these items were defendant's and not his wife's assets. It used the extra-judicial admissions of petitioner in an attempt to present such proof. It did not

at the trial, present any independent third party proof that the real estate, life insurance (Acacia Life) and bonds did not belong to Mrs. Burdick. It relied solely on the net worth statement given its agents by the petitioner and which he considered was a joint statement of his and his wife's net worth (p. 263a).

It appears that the government shifted the whole burden of proof from the very beginning of petitioner's case to him to prove that he was innocent of the crime charged. It procured its proof of his other security holdings, bank accounts, mortgage and expenditures from his oral statements and cancelled checks which he gave the agents under a misapprehension that he was settling civilly any taxes he owed the government.

Petitioner also informed the agents that his wife had some money of her own with which she could have bought the bonds in question; that after his mother died in late 1946, he found (in January 1947) the sum of $1,600.00 in her trunk which he kept and used (pp. 412a-413a). Also in his net worth statement at the close of 1950, he included a loan payable of $1,000.00. Mr. Oberholtzer testified to the purchase of the bonds by Mrs. Burdick (pp. 377a-380a).

The agents did not give him credit for any of these items. They took what was favorable to the government and used it and denied petitioner the use of whatever was favorable to him. It is submitted the $1000.00 loan payable was a lawful liability and should have been allowed by the agents in a net worth case.

Although the government accepted the item of $4,000.00 cash currency petitioner stated he possessed (after it had denied it for indictment) (p. 279a); they did not present any independent evidence of it or of any amount he might have had. Neither did the agents present any independent proof that Mrs. Burdick did not have any money or assets. They did not question or attempt to question her although she was available for interview. They did not question Mrs. Burdick or petitioner's sister as to the $1,600.00 found in

his mother's trunks nor were any inheritance records produced showing petitioner's mother had or had not left an estate.

It is submitted that the government's agents did not definitely and accurately ascertain the taxpayer's starting net worth although the sources to do so were available, and as a result therefore they cannot use the extra-judicial admissions of the taxpayer to obtain a conviction against him. They have not proved the corpus delicti or any substantial portion of it. This view is supported by *Calderon v. United States*, 207 F. 2nd 377, certiorari allowed (C. A. 9), where the court stated—"The burden of proof is on the prosecution as to each pertinent starting item of the net worth statements to a reasonable certainty. Absent such a starting item as, say, cash on hand the remainder of the statement proves nothing * * *"

There was not sufficient evidence to support the Court below in its refusal of petitioner's motions for directed judgment of acquittal.

Several of the government's witnesses testified that they had given petitioner gifts or presents of money during its period involved, and that it was their intention to give the money as gifts or presents. Petitioner testified that he was told by his friends that those monies were given to him as gifts and presents. That he considered them as such; that he had not anticipated them or had done any services for them to consider the payments as compensation. He would have done these favors whether or not he was going to receive payments for them.

Also that he had gone to the office of the Internal Revenue in Atlantic City, explained at least two of the transactions were gifts and not reportable as taxable income. Further, that the government's written instructions indicated gifts were not taxable.

The persons making the payments were not under obligation, legal or otherwise, to pay Mr. Burdick any compensation or consideration of any kind. The payments were not made or intended to be made for services rendered or to be rendered or for any consideration given or to be given by any of them. There is entirely lacking in this case, the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from a generous act. The acts of the donors were acts of spontaneous generosity.

It is contended that there was no consideration involved and Mr. Burdick was not in the position of a servant to the donors; he was not receiving "additional compensation" from them. That it was the intention of substantially all of them to make a gift or present to him. That the payments were made to show their good will and kindliness toward petitioner.

Mr. Burdick had no agreements to perform duties for the donors. If he had any agreements to perform services for compensation he reported such receipts as taxable income. It is submitted that these payments were gifts and is supported by the law in *Bogardus v. Commissions*, 302 U. S. 40-42. Further that it was the duty of the trial judge to decide as a matter of law that these payments were gifts and not taxable income. That it was not just a question of fact for the jury to decide.

It is also contended by petitioner that these sums given him were not taxable income and did not have to be reported.

The Court of Appeals in its opinion cites two examples of "gifts". One of these was the payments by Captain Hart. It is not maintained by the petitioner that the Hart payments were gifts. Under cross-examination, Captain Hart testified that he paid this money to Mr. Burdick, not as a gratuity but to entertain people in his behalf at Trenton. That he knew Mr. Burdick spent the money as the results proved it. From this testimony it appears petitioner is

entitled to more deductions for business entertainment (p. 112a).

As to the payments made to petitioner by Outdoor Advertising Association, Mr. Harvey, one of its officers, testified that there was no agreement with petitioner for payment of any specific amounts to him. That Mr. Burdick had no knowledge of any payment of money to him until he received it. As far as he was concerned and to the best of his knowledge. That the association would have a meeting when it was decided what it would give petitioner (p. 189a).

The Court also holds that there was evidence from which the jury could infer that petitioner sought to conceal some of his assets by having them carried in his wife's name.

It is respectfully submitted that the life insurance on Mrs. Burdick's life couldn't be in any one else's name; the lot was lawfully given to Mrs. Burdick by petitioner in 1944 before the period involved began; when the lot was sold in 1948, the capital gain on it was reported in their joint tax return for 1948; and the Osborne Avenue property was purchased with proceeds from the sale of the lot and war savings bonds (ownership in Mrs. Burdick having been described previously (pp. 428a-430a)) plus the mortgage money and a small amount of petitioner's money. The real estate and bonds were of public record.

As to the Prudential application containing the statement of annual income being about $10,000.00. This does not necessarily mean taxable income and is questionable competent testimony.

Petitioner submits he did not willfully evade payment of income taxes and no such evidence was produced by the government to show he had a specific intent involving bad purpose and evil motive. *Wardlaw v. United States*, 203 F. 2nd 884 (C. A. 5); *United States v. Murdock*, 290 U. S. 389; *Hargrove v. United States*, 67 F. 2nd 820; *Hughes v. United States*, 172 F. 2nd 986. There was an actual bona fide misconception of the law by petitioner as to gifts, if the payments are not found to be gifts.

There was not sufficient evidence to support the court below in its refusal to grant defendant's motion to suppress the use as evidence against defendant the net worth statement, records and oral admissions given to and made to Special Agent Gerson and Internal Revenue Agent Blackman at and between their first two conferences on November 6, 1951, and in January, 1952.

It is the contention of the defendant that the information the government agents got from him when he turned over his bank records, cancelled checks, brokerage records and miscellaneous records, as well as his oral admissions made to them during this period, as well as the net worth statement signed by him should not have been allowed in evidence by the trial Judge in his criminal case.

This contention is based upon two separate yet interrelated grounds. One is the constitutional guarantee in the Fourth Amendment to the Constitution of the United States against unlawful searches and seizures, and the second is the privilege against self incrimination contained in the Fifth Amendment.

Special Agent Gerson testified that the purpose of his investigation of the taxpayer was a criminal investigation; to investigate an alleged evasion of income tax. That it is his department (Intelligence Unit) that recommends prosecution of taxpayers for tax evasion. That all he told Mr. Burdick at his first meeting on November 6, 1951, was whatever he told or gave him was voluntary. That he did not tell him that anything he would give to him would be used against him in a criminal prosecution; also, that he did not warn him at their second meeting (pp. 58a-62a). Further that he did not advise defendant of his rights under the Fourth and Fifth Amendments to the United States. That he didn't know the Fourth and Fifth Amendments; not in their exact wording.

The defendant believed that the government was just

checking his returns and had gotten no warning from Special Agent Gerson or Agent Blackman that they were making a criminal investigation of his tax returns. That neither one warned him of his Constitutional Rights not to testify against himself. That on November 6, 1951, Mr. Gerson asked him several questions pertaining to his bank accounts, savings accounts, stocks, safe deposit box, real estate, insurance and as to where he got his money (pp. 418a-423a).

Inasmuch defendant was not warned of his constitutional rights he was misled by the government agents, particularly Special Agent Gerson, into turning over to him his various records for examination and giving him a net worth statement and other information as to his various financial and business transactions. He was under a misapprehension of the true facts of the case.

It is submitted that as defendant was misled into giving consent to the examination of his records; presenting a net worth statement, and giving other information to the agents, verbally, his action in so doing cannot be considered voluntary insofar as making available his records, net worth statement and transactions for the purpose of investigation to establish fraud for criminal investigation purposes. That they were obtained from him in violation of the Fourth Amendment and would be a violation of his rights under the Fifth Amendment. *Gouled vs. United States*, 225 U. S. 298, at page 305, states:

> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself, or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

To permit evidence to be obtained against a defendant by the means here employed (however innocently it may have

been done in this case) would be to encourage overzealous and less scrupulous officers and agents of law enforcement agencies to chip away rights, guaranteed by the constitution to defendants by trick and artifice, to do what could not be done in court proceedings, i. e., compel a defendant to testify against himself.

In *Shinyu Noro vs. United States,* 148 F. 2nd 696, the court stated inter alia.

> "in the case of the truth, even though unlawfully discovered, as evidence in the prosecution of a crime is not prohibited by constitution or other statutes, but it is a Federal Judicial policy not to allow agents and officers of the United States to break the law themselves and then use information so acquired to prosecute others."

In *Hanson vs. United States,* 186 F. 2nd 61, the Court, in calling attention to the defendant's contention of the violation of his constitutional rights under the Fourth and Fifth Amendments by failing to advise him of them stated, inter alia,

> "* * * at the time in question there is not evidence that a criminal prosecution was in contemplation. The government agent, in the performance of his duty, went to the defendant, advising him that he wished to check his income tax returns for the years in question. There is nothing to indicate that there was even any suspicion at that time that the defendant was guilty of a criminal offense. In these circumstances we think there was no occasion nor necessity for warning the defendant that any statements he might make or documents he might produce would be used against him in a criminal prosecution."

The principal factors referred to by the Court as being lacking and which by implication were necessary to sustain the plea of the Fifth Amendment are present in the instant

case. Here, at the time the defendant produced his papers, net worth statement and other records and gave information, criminal prosecution was contemplated, whereas in the *Hanson* case, there was nothing to indicate that there was any suspicion that the defendant was guilty of a criminal offense. Special Agent Gerson testified that the purpose of his investigation was for criminal prosecution, that he had information that the defendant may have evaded payment of income taxes.

It is submitted that the Court of Appeals for the 8th Circuit would have reached a conclusion that the defendant was entitled to a warning before the information could be said to have obtained from the defendant without doing violence to his privilege under the Fifth Amendment.

In *Guerrina vs. United States*, 112 Fed. Supp. 126 (U. S. D. C. E. D. of Pa., May 5, 1953), Judge Clary held that the defendant

> "* * * was induced under a misapprehension of the true facts and circumstances to give his consent to an examination under circumstances which rendered that consent to an examination ineffective and the search unreasonable and therefore unlawful His rights were further violated in that he was induced by reason of the same misunderstanding of the true facts and circumstances to give testimony against himself without proper warning. The evidence and information so obtained by the government may not be used against the defendant and the motion to suppress evidence and to return property shall be granted."

Also, *Pollock vs. United States*, 202 F. 2nd 281, C. A. 5.

The opinion of the Court of Appeals in the instant case cites the cases of *Montgomery v. United States*, 203 F. 2nd 887; *Powers v. United States*, 223 U. S. 303, 312, and *Wilson v. United States*, 162 U. S. 613, 623.

The *Montgomery* case appears to be in conflict with *Pol-*

lock v. United States, 202 F. 2nd 281-284, decided by the same court but a few months prior to Montgomery.

In the *Pollock* case the court stated, page 284 "* * * In the present case, the government agents made a rather thorough independent investigation; and then, by repeated examination of the taxpayer under oath, and also of his wife, after due warning of their constitutional rights, traced their financial history back for many years, established their net worth at the beginning of the questioned period and excluded every source of increase of net worth other than taxable income * * *"

It appears that the *Montgomery* and *Hanson* cases depend on the *Powers* and *Wilson* cases.

It is respectfully submitted that these recent cases have a misconception of the facts in the two earlier cases. In the *Wilson* and *Powers* cases the defendants each testified before a United States Commissioner shortly after the crimes were committed. They were not advised as to their constitutional privileges but they were advised as to the crimes they were charged with.

In none of these income tax cases was the taxpayer made aware of the charges against him. It is contended, therefore, that the reason why the court did not consider a constitutional warning necessary was that the defendants were aware of the criminal aspects of the matters having been told by the United States Commissioners of the charges against them.

In the *Wilson* case, page 616 in the statement of facts, it is related the Commissioner said, "that the statement was his (Wilson) statement as made and written down at the time; that he read the charges to Wilson and went on and examined him; and he answered the questions * * *."

In the *Powers* case, page 315, in the court's opinion it is stated "* * * It appears that Powers testified, being charged with illegal conduct concerning the distillation of spirits * * *."

Petitioner further contends that an examination of a

taxpayer under section 3614 (a) of the Internal Revenue Code is in the form of and similar to an inquisition by a grand jury and as he was a subject of such an examination he was actually a defendant in a criminal case and entitled to a warning as to his constitutional privileges. *United States v. Lawn*, 115 Fed. Supp. 674.

In *Falsone v. United States*, 207 F. 2nd 737 the Court stated "* * * The power granted to the commissioner of Internal Revenue by 26 U. S. C. A. No. 3614 is inquisitional in character and has been compared to the power vested in federal grand juries." *Bolich v. United States*, 67 F. 2nd 894, 895 (C. A. 2); *Brownson v. United States*, 32 F. 2nd 844, 848 (C. A. 8).

The Court below should have granted petitioner's motions for withdrawal of a juror, which motions were based upon the United States Attorney's remarks and conduct.

It is fundamental that the defendant in a criminal case is entitled to a fair trial, and intemperate, abusive and overzealous remarks by counsel for the government during the course of the trial, examination of witnesses, or the summation, are often sufficient ground per se to justify and demand the reversal of a judgment of conviction even though the trial Court is the only check upon any improper action of his. *Berger vs. United States*, 295 U. S. 78; and *Viereck vs. United States*, 318 U. S. 236, 248.

It is submitted that the United States Attorney in this case, overstepped the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense and unduly prejudiced the defendant to the jury; and that the advice by the Trial Judge to the jury to overlook such actions and remarks was not sufficient to remove such prejudice. Defendant's coun-

sel took objections to these various acts, moving for a mistrial, which were denied.

The record is replete with admonitions by the Trial Judge to the United States Attorney and motions for a withdrawal of a juror by defense counsel.

During Special Agent Gerson's testimony (pp. 68a-70a) defendant's counsel objected to Mr. Richman (United States Attorney) while sitting close to the jury prompting his assistant, Mr. Rutkowski; as a result the Court directed the United States Attorney to remain in his place at the counsel table and see that only one of the government attorneys registered objections. Mr. Richman asked the Court, "Are we going to have a lying down—" and the Court ordered him, "Don't provoke me."

During the presentation of some stipulations (pp. 94a-95a) the United States Attorney disagreed to presentation of certain offered stipulations by defense counsel; he refused as Mr. Reiners stated "viciously" and the Court ordered him to content himself, that he would have an opportunity to answer him. Mr. Richman began to say "that is rather—" when the Court said to him "never mind, no remarks. Don't mumble them either. I didn't hear what you said."

And following the same (pp. 96a and 97a) when Mr. Reiners, defense counsel, was objecting to putting into evidence the defendant's bank records in which the Court was protecting him, Mr. Richman remarked, "Do I understand that the defendant, in other words is not willing to have his bank records made known to the jury." The Court ordered the remark stricken out, but defense counsel moved for withdrawal of a juror as it being prejudicial to defendant. The Court stated to Mr. Richman that this case had been tried once before at great length and had entailed the government in great expense and admonished him not to risk the withdrawal of a juror. That he wasn't going to do it at that time because he did not think the defendant had been prejudiced. That his actions had kept on and he did not seem to know the cause of the mysterious mumblings.

During the cross-examination of Mr. Willits, defense counsel again called attention to the Court of the United States Attorney's mumblings (pp. 151a, 152a) and the Court directed him to deport himself as a lawyer should under the circumstances and not make any comment. Mr. Richman stated he did not make any comment to the Jury or anyone else. The Trial Judge stated that he hadn't said anything to the jury, but that he had made a comment, and if it wasn't directed to the jury or anybody else, then he made it to himself, and please try not to talk to himself and not to let it happen again.

During the testimony of Harry A. Sweeney (p. 175a), when Mr. Reiners objected to the United States Attorney's actions, Mr. Richman was directed by the Court to eliminate any further remarks after his rulings were made; and Mr. Richman replied, "We are getting at least to the point where I cannot say anything at all, but I will try."

During Mr. Harvey's testimony (p. 191a) Mr. Richman was directed by the Court please not to make a nuisance of himself. That if he was not going to make an objection, he should remain silent under severe penalty.

During interrogation of Mr. Grant, a government witness, as to defendant's purchase of a cadillac automobile, Mr. Richman, stated, "I am not going to quibble with this witness any longer. If counsel wants to conceal the fact ** *." This remark was ordered stricken out by the Court, but defense counsel moved again for withdrawal of a juror on account of prejudice to the defendant. The trial judge cautioned the jury that it should completely eradicate from its mind the remarks of the United States Attorney. The Court admonished Mr. Richman telling him that this was the third or fourth time that he had to deny a motion for a mistrial. That they now had four days and a great deal of preparation for trial, and on that account he didn't feel that a mistrial should be granted; that he had warned him that a repetition of this kind of remark will find its reaction in the granting of a motion for a mistrial when made by

defense counsel if he persisted in that kind of conduct (pp. 193a-195a). Mr. Richman replied that he did not have to sit there and take remarks that he was not conducting himself improperly because he was not. That the trifling objections being made to trifling remarks were an attempt to play up something out of nothing. That it was a deliberate plan and scheme to play up something out of nothing.

The Court told him that the remark that he had made was to imply that the defense counsel and the defendant wanted to conceal something. That it was uncalled for.

During the cross-examination of defendant, defense counsel made an objection and its United States Attorney exclaimed, "Correct me—he wants me instructed." Defense counsel again moved for withdrawal of a juror due to the conduct of the United States Attorney as it was prejudicial to the defendant. After a colloquy between the Court and Mr. Richman, he was directed to restrain himself and not persist in running the hazard of having to try the case all over again, which would be quite catastrophic.

Mr. Reiners called the Court's attention that Mr. Richman was not conducting himself properly in accordance with the rules of acceptable procedure. That he hadn't made any comment about it before, but sometimes during the course of his interrogation of witnesses, Mr. Richman had been standing back of the jury box, alongside the railing, close to Juror No. 7, and at other times he was wandering in the Court room when he was making an objection * * * that his objections being made were made in good faith and on well merited grounds.

Mr. Richman suggested to the Court that they were not made in good faith, but the Court ruled that they were.

Immediately thereafter, Mr. Richman made a comment saying that he disagreed with the Court. The Court again admonished him not to do those things; that he didn't want to hear any more from him, not even a small whisper (pp. 431a-436a).

During the United States Attorney's closing speech to the

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jury, Mr. Richman stated that defendant didn't care where the money he got from David Kent came from; that, "he didn't care whether it came from the Archbishop of Canterbury or 'Longie' Zwillman."

Defense counsel moved for a withdrawal of a juror. That the two characters mentioned never appear in the testimony. That "Longie Zwillman" is a character of an unsavory reputation; and that the remarks were definitely prejudicial to the defendant. That it inferred an association between defendant and a personality which was detrimental by inference and by reference. The motion was denied by the trial judge who believed that his cautioning to the jury was sufficient to remove any prejudice (pp. 450a-452a).

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons the petition for a writ of certiorari should be granted by this Honorable Court.

JOHN H. REINERS, JR.,
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JOHN C. NOONAN,
Of Counsel.

Appendix

OPINION OF THE COURT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,135.

UNITED STATES OF AMERICA

vs.

LESTER H. BURDICK,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued April 5, 1954.
Before GOODRICH, KALODNER and HASTIE,
Circuit Judges.

OPINION OF THE COURT.

(Filed July 1, 1954.)

By KALODNER, Circuit Judge.

This is an appeal from a conviction for income tax evasion under Section 145(b) of the Internal Revenue Code, 26 U. S. C. Section 145(b).[1]

The appeal is premised on (1) alleged insufficiency of the government's evidence; (2) denial by the trial judge of defendant's motion to suppress as evidence his statements, oral and written, and certain records given by him to government agents in the course of their investigation of his tax returns; and (3) alleged prejudicial conduct of government counsel.

A brief statement of the factual background is in order.

The defendant, Lester H. Burdick was tried on a five-count indictment charging him with filing false and fraudulent income tax returns for the years 1946 to 1950, inclusive.[2] He was found guilty on all five counts and sentenced to jail for a year and a day on each of them, the sentences to run concurrently.

The evidence at the trial established that during the period involved the defendant was employed as an executive clerk of the New Jersey State Senate when it was in session and also did public relations work and sold radio advertising time. The latter activities were conducted from his home.

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[1] This section provides:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Defendant kept no books or records; he had only his cancelled checks and bank statements. During the course of an investigation by revenue agents prior to his indictment, defendant gave them a statement of his assets and liabilities as of January 1, 1946, and December 31, 1950, the opening and close of the taxable years here involved.

In computing defendant's alleged tax deficiency the government used what has come to be known as the net worth-expenditures method.[3] It based its case on the data obtained from the defendant and independent evidence of his personal expenditures; his receipt of substantial sums of money which he had not reported as income in his returns, because he treated them as non-taxable gifts; his various securities and real estate transactions.

The government presented a detailed analysis of defendant's bank records, brokerage accounts, real estate transactions, expenditures, unreported receipts and his own net worth statement previously referred to.

Revenue Agent Blackman, a government witness, submitted a calculation of defendant's net worth at the beginning of 1946 and for each of the taxable years involved. He testified that the defendant's expenditures for the five years under review were almost three times his reported net income for the period—$44,056.83 expenditures to $15,503.17 net income.[4]

At the trial the crux of the defense was that the government had placed an excessive valuation on listed assets, and moreover had erroneously included in such assets property which belonged to his wife; that it had not given effect to cash which he and his wife had kept on hand at home;[5] that his personal expenditures were less than those asserted by the government;[6] and that he had properly and in good faith treated unreported income as gifts. On the

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[2] Individually for the years 1946 and 1947, and jointly (for himself and his wife) for the years 1948, 1949 and 1950.

[3] For an excellent discussion of this method of proof see United States v. Caserta, 199 F. 2d 905 (3rd Cir. 1952); Montgomery v. United States, 203 F. 2d 887, 892 (5th Cir. 1953).

latter score it must be noted that defendant did not deny his receipt of the unreported sums which he treated as "gifts".

The trial judge in his charge correctly instructed the jury with respect to the issues presented by the testimony. He specifically charged the jury that there should be included in its determination of the defendant's net worth only such assets as belonged to him and that it was its function to determine the ownership of the various items of securities and real estate involved in the controversy. He further charged the jury it was its duty to fix a valuation of such assets as belonged to the defendant in the light of the testimony on that score and that it was for it to determine whether there had been any increase in defendant's net worth during the taxable years under review. He explicitly charged the jury on the issue of the defendant's expenditures. On the score of the unreported sums received by the defendant, the jury was charged it had to make a finding as to whether they were "gifts" or "taxable income", under stated applicable legal principles; [7] that in the event it found them to be taxable income, they must be eliminated from consideration in determining the guilt of the defendant "if his failure to report these items was due to an honest, even though mistaken opinion that these items were not subject to tax."

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[4] Government's calculation with respect to the items listed:

	Net Worth Increase	Expenditures	Gross Income Reported	Net Income Reported
1946	$3,518.78	$8,078.89	$4,610.00	$2,986.29
1947	8,446.46	8,822.77	5,116.78	2,376.70
1948	805.64	12,035.45	5,195.55	3,077.92
1949	3,716.35	7,451.01	4,365.33	2,174.17
1950	3,986.64	7,668.71	5,839.25	4,888.09

[5] Defendant testified that when his mother died in 1947, he had found $1600 in her trunk, which he kept. The defense also contended that Mrs. Burdick, the defendant's wife, had purchased out of cash which she had on hand, eighty-two $50 government bonds at a total cost of $3,075 in 1946-1947. The bonds were registered in the name of the defendant and Mrs. Burdick.

[6] The government estimated defendant's living expenses at $2,000 a year basing that estimate on the defendant's admission that he spent $20-25 a week for household expenses alone. Defendant contended that his total household and living expenses were slightly more than half of the government's $2,000 figure.

On review of the record we are of the opinion that the evidence amply sustained the jury's factual determination with respect to the issues of ownership of the controverted assets, their valuation, the increase in the defendant's net worth and the scope of his expenditures. The same is true with respect to the jury's finding that the unreported receipts were not "gifts" but income; that the defendant's failure to report them as income was not due "to an honest though mistaken opinion" as to their nature; and its ultimate finding that the defendant was guilty of willful evasion of the revenue statute.

There is no need to consider at length the defendant's contentions that the evidence failed to justify the jury's finding that the unreported receipts of approximately $14,500 from ten individuals were income and not gift.

As we held in Smith v. Manning, 189 F. 2d 345, 348 (1951), whether the receipts are gifts is primarily a question of fact to be resolved upon the peculiar circumstances of the case; [9] the mere fact that the payments were voluntary does not establish them as gifts; [9] if the payments were made without a donative intent and as compensation for services they constitute taxable income.[10] The term "gift" as used in the revenue statute "denotes the receipt of financial advantage gratuitously." [11]

The testimony fully established that defendant's unreported receipts, which he treated as "gifts" were compensation for services rendered or to be rendered, even though the payments were voluntarily made. They could, at the least, be broadly identified as "gratuities" or "tips" and it is well-settled that such receipts are not gifts, but taxable income. [12]

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[7] The trial court charged:

". . . In order to establish a gift, the circumstances surrounding the payment of money must disclose that it was the intent to bestow financial advantage gratuitously. If so, it is not subject to tax. A gift is nonetheless a gift because inspired by gratitude for past faithful service of the recipient; on the other hand, if the circumstances under which the payment was made disclose that it was for services rendered, or to be rendered, then it must be considered income subject to tax.

Two examples will suffice. Captain David T. Hart, a commercial fisherman and "public relations man" for the Fishermen and Food Workers, testified that he gave the defendant his personal checks for $2,000 in 1947 and $1,000 in 1948. Hart said he was reimbursed by the group he represented. In 1949 and 1950 the defendant was paid $2,000 annually directly by the group.[13]

The nature of Hart's payments to the defendant is illuminatingly illustrated by the following:

> "Q. What did you pay out your money for, Captain?
> "A. I gave Mr. Burdick this money for educating me to the ways of the Legislature because of the knowledge he had of the Legislature. Being a fisherman, I had none. I had never been to the State House until 1946. We felt that during that period, Mr. Burdick did us the service we wanted. He certainly educated me in the ways of the Legislature, and he knew the routine to be followed."

George M. Harvey, Jr., an officer of the Outdoor Advertising Association, testified that the Association "paid" the defendant $500 in each of the years 1946, 1947 and 1948, and $1,000 in both 1949 and 1950. These payments were treated by the defendant as "gifts" and not reported in his returns.

Harvey was asked:

> "Q. What did Mr. Burdick do for your association?
> "A. Well, he kept us in touch with any bills that were

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[8] Bogardus v. Commissioner, 302 U. S. 34 (1937); Commissioner v. Jacobson, 336 U. S. 28, 51 (1946).

[9] Old Colony Trust Company v. Commissioner, 279 U. S. 716, 730 (1929).

[10] Sportswear Hosiery Mills v. Commissioner, 129 F. 2d 376, 382 (3rd Cir. 1942).

[11] Helvering v. American Dental Co., 318 U. S. 322, 330 (1943).

[12] For an excellent discussion of "tips" and their taxable status see Roberts v. Commissioner, 176 F. 2d 221 (9th Cir. 1949).

[13] Defendant treated the money received from Hart in 1947 and 1948 as "gifts" and did not report it. Significantly he reported the money received from the Fishermen and Food Workers in 1949 and 1950 as income.

introduced in the Legislature that he thought might affect our business, and at times he sent us copies of the bills and kept us advised with the progress of those bills in the Legislature.

"Q. And those payments and that type of service represents the usual type of service rendered by Mr. Burdick over all the years in question, is that right?

"A. Yes."

Defendant vigorously urges that the evidence did not justify the jury's finding that he willfully attempted to defeat and evade the payment of taxes due.

This question, of course, is one of fact. United States v. Smith, 206 F. 2d 905 (3rd Cir. 1953). But the government need not adduce direct proof of intent. Norwitt v. United States, 195 F. 2d 127 (9th Cir. 1952), cert. denied 344 U. S. 817 (1952). It may be inferred from the surrounding circumstances, "* * * and the inference may be drawn from a combination of acts and circumstances, although each separate act and circumstance standing alone is inconclusive." Gaunt v. United States, 184 F. 2d 284, 290 (1st Cir. 1950), cert. denied 340 U. S. 917 (1951).

By way of illustration, the Supreme Court, in Spies v. United States, 317 U. S. 492 (1943), stated (page 499):

> "* * * we would think affirmative willful attempt may be inferred from conduct such as * * * destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."

Here several items of evidence support an inference of willful attempt to defeat or evade the tax.

Special Agent Gerson testified that defendant told him that he kept certain memoranda and notes, but that they were always destroyed when his returns were filed or soon

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thereafter. Willits, who prepared all of defendant's returns for the years under prosecution, stated that the defendant never produced any books or other financial records for his examination, nor ever informed him of the various money payments, heretofore adverted to, which are now contended to be gifts. Although defendant testified that, in response to his inquiry, the local Internal Revenue Office in "1940-1943 or 1944" had advised him that these money payments were not taxable, he was unable to say whom he had consulted. Furthermore, there was evidence from which the jury could infer that defendant sought to conceal some of his assets by having them carried in his wife's name. Finally, when negotiating for a loan in 1948, defendant told an appraiser for the Prudential Insurance Company that his annual income was about $10,000, notwithstanding the fact that his *reported* gross income for none of the prosecution years exceeded $6,000.

Subjected to the test set out in the Spies case, we think that this evidence was clearly sufficient to establish a *willful* attempted evasion of the income tax.

* * * * * * * * *

We come now to defendant's second point—that the trial judge committed prejudicial error in denying his motion to suppress certain evidence. The latter included defendant's bank and brokerage records, a net worth statement prepared by his accountant, Willits, and oral admissions, all of which were given or made by the defendant to Special Agent Gerson of the Intelligence Unit, Internal Revenue Service, during the course of the government's pre-indictment investigation of defendant's financial affairs. The motion to suppress, was based upon the claim that when the above data and information was submitted to Special Agent Gerson, the latter allegedly failed to warn defendant that he did not have to testify against himself nor give any information that might be used against him in a criminal proceeding.

We are of the opinion that the trial judge did not err in denying the defendant's motion to suppress.

It is well-settled that it is "* * * not essential to the admissibility of his (defendant's) testimony that he should first have been warned that what he said might be used against him," providing that the defendant's statement "* * * was entirely voluntary and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial." Powers v. United States, 223 U. S. 303, 312 (1912).[14]

Pertinent to and dispositive of the defendant's contention is a recent decision of the United States Court of Appeals for the Fifth Circuit, Montgomery v. United States, 203 F. 2d 887 (1953). It was there stated (page 892):

> "* * * In the present case, Special Agent Baskett testified that * * * he never at any time told the defendant that any document that was surrendered to him or his fellow agents would be used in either a civil or criminal prosecution against him. The defendant testified that, when Baskett and Government Agent Wilson first came to see him about his income tax matters, they told him that it was a routine check up, and that on each occasion he conferred with them, they told him it was purely a civil matter, that they would soon let him know how much taxes he owed, if any, and allow him to pay them, and that at no time was it intimated to him that there might be a criminal prosecution * * * We do not think the circumstances under which the statements of the defendant and of his wife, and the cancelled checks and documents, were obtained were sufficient of themselves to require that evidence be excluded on the ground of being involuntary as a matter of law * * * All of those circumstances were matters

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[14] As early as 1896, the Supreme Court in Wilson v. United States, 162 U. S. 613, 623 (1896) enunciated the rule that ". . . the true test of admissibility . . ." was whether the statements were ". . . made freely, voluntarily, and without compulsion or inducement of any sort."

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which went to the weight or credibility of the testimony thus obtained. (citing cases)"

To the same effect are United States v. Block, 88 F. 2d 618 (2d Cir. 1937), cert. denied 301 U. S. 690 (1937); United States v. Heitner, 149 F. 2d 105 (2d Cir. 1945), cert. denied sub nom, Cryne v. United States, 326 U. S. 727 (1945); and Chieftain Pontiac Corp. v. Julian, 209 F. 2d 657 (5th Cir. 1954).

In the instant case the uncontradicted testimony reveals that defendant was under no compulsion when he submitted the evidence in question to Special Agent Gerson. On direct examination Gerson described the circumstances surrounding his initial meeting with defendant as follows:

> "I called him on the telephone to make an appointment for him to come in and give me such information about his financial background that I needed for the purposes of this case. I believe on the phone I told him * * * that it would be an informal meeting, and made an appointment with him to come in on November 6, 1951. He brought with him Mr. Willits whom he introduced as his accountant. I introduced myself to both of them, told them that I was a representative of the Intelligence Unit in Philadelphia, and I told them that it would be an informal meeting, and he could answer any questions that he wanted, or he could refuse. I also told him that anything he cared to give me would be voluntary. He said that he would be glad to cooperate with the department in any way. He said he would give me or the department anything I thought was necessary. * * *"

When asked upon cross-examination whether he had warned defendant that anything said might be used against him in a criminal prosecution, Gerson replied: "I told him anything that he told me would be voluntary at that point."

* * * * * * * * *

Defendant's final contention is that the United States Attorney was guilty of prejudicial conduct during the course of the trial.

We are convinced, however, that though the government prosecuted with vigor, and was undoubtedly overzealous at times, no substantial rights of the defendant were affected. The record reveals that the trial court maintained an attitude of impartiality throughout the trial and was quick to admonish government counsel in the presence of the jury when the proprieties required it. Furthermore, in his charge to the jury, he stated:

> "* * * you, and you alone, are the sole judges of the facts in the case * * * you will not permit any invasion of your province to alone judge of the facts * * * I also call your attention that you should keep your minds uninfluenced by any extraneous remarks that may have been made by counsel in this case, particularly since the counsel table of the Government is traditionally close to the jury box. If you have heard any remarks or side remarks at Government's table uttered by the United States Attorney, you will exercise, I am sure, your good common sense and completely disregard them and not let them influence you in any way, in the case because only the evidence that you hear in the court room is the material on which you work and upon which you arrive at your verdict."

For the reasons stated the judgment of conviction and the sentence imposed thereon by the District Court will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court
of Appeals for the Third Circuit.

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JUDGMENT.

PRESENT:
GOODRICH, KALODNER and HASTIE, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by Counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction and the sentence imposed thereon by the said District Court is affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

July 1, 1954.

(Received & Filed July 1, 1954
Ida O. Creskoff, Clerk.)

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 249

LESTER H. BURDICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 28–38) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 39) was entered July 1, 1954. The petition for a writ of certiorari was filed July 29, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether petitioner was entitled to suppression of a net worth statement he gave to a revenue agent, on the ground that the agent failed to warn him of his constitutional right not to incriminate himself.

3. Whether the trial court should have declared a mistrial because of alleged misconduct on the part of the prosecutor.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 145.)

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STATEMENT

On September 17, 1952, petitioner was indicted in the United States District Court for the District of New Jersey on charges of wilfully attempting to evade income taxes for the years 1946 through 1950 by filing fraudulent returns,[1] in violation of Section 145 (b) of the Internal Revenue Code. (R. 1, 5–8.)[2] The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1946)	$2,986.29	$282.49	$13,495.76	$3,228.47
Count II (1947)	2,376.70	261.57	15,422.55	4,235.67
Count III (1948)	3,077.92	311.74	8,881.48	1,376.72
Count IV (1949)	2,174.17	161.72	8,495.60	1,302.04
Count V (1950)	4,868.09	641.72	11,106.58	1,947.90

After a jury trial petitioner was found guilty as charged, and on May 15, 1953, he was sentenced to concurrent terms of imprisonment for a year and a day on each of the five counts. (R. 472–473.)

The investigation of petitioner's returns for the years in question began with a conference between Special Agent Gerson, petitioner, and

[1] Individually for the years 1946 and 1947, and jointly (for himself and his wife) for the years 1948, 1949 and 1950.

[2] References to the Appendix for appellant will be designated "R.", and references to the Appendix for appellee will be designated "R.' ".

petitioner's accountant, Willits, a former internal revenue agent. Gerson stated at the outset that he was a representative of the intelligence unit, and advised petitioner that he did not need to answer any questions if he did not wish to do so. Petitioner answered a great many questions and voluntarily turned over his bank records and cancelled checks. He said that he had no other formal records and that he had always destroyed all informal records in the shape of notes and memoranda as soon as his annual return had been filed.[3] At Gerson's request petitioner agreed to submit a net worth statement showing his assets and liabilities as of January 1, 1946, and December 31, 1950. (R. 26–27, 31–34, 42, 59–62, 417–420; R.' 1–3.) About two weeks later Willits brought in the statement (Gov't. Ex. 6) which he had prepared with petitioner's assistance.[4] (R. 27–28, 137–138, 465.)

Revenue agents made an independent investigation to determine the accuracy of petitioner's statement, and they also analyzed his cancelled checks to determine his nondeductible expenditures for the years involved. (R. 43–57, 157–158.) At the trial they testified to the follow-

[3] Willits received no information from petitioner in preparing his returns except a summary statement and withholding forms. (R. 133–135.)

[4] The agents also held two subsequent interviews with petitioner during the investigation. (R. 420–423.)

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ing results of their investigation (R. 160–163, 196–223):

	Net Worth Increase	Expenditures
1946	$3,818.78	$6,078.80
1947	8,446.46	8,822.77
1948	805.64	12,035.45
1949	3,716.35	7,451.01
1950	3,986.64	7,668.71

Petitioner's actual net taxable income, calculated on this basis, exceeded his reported income in the amounts shown in the following table (R. 207–208, 212–213, 214, 215, 216):

	Actual	Reported
1946	$8,401.27	$2,[illegible].20
1947	14,772.47	2,376.70
1948	8,035.92	3,[illegible].92
1949	8,237.94	2,176.17
1950	9,937.07	4,[illegible].79

Petitioner attacked the computation on the ground that some of the assets attributed to him actually belonged to his wife, i. e., two insurance policies, Government bonds worth $3,000, and two parcels of real estate valued, respectively, at $1,750 and $22,500. However, the Government's computation had not included the increase in the cash surrender value of the insurance policies, but only the amount of the premiums actually paid by petitioner himself. (R. 44, 206–207, 212, 214, 215, 216.) And there was abundant evidence to indicate that the bonds (R. 57, 430; R.' 2–3, 44–51) and the real estate (R. 44, 64, 78, 80, 427, 429, 437; R.' 5, 52–57), which peti-

tioner himself had included in the statement submitted to Special Agent Gerson (R. 465), belonged to him rather than to his wife.

The Government also proved that petitioner had received numerous specific sums which he had failed to report as income. Several witnesses testified that they had paid him from $500 to $2,000 annually for services or favors which petitioner had done for them by reason of his position as executive clerk of the New Jersey State Senate. Petitioner admitted receipt of all these payments but contended that they were gifts. (R. 388–412.) Most of the witnesses who had made these payments characterized them as "gifts," but they also admitted that petitioner had performed services for them in connection with state legislation. (R. 99–131, 165–195.) Two witnesses testified that they had made small payments to petitioner which were clearly intended to purchase "protection" for gamblers. (R.' 9–31.) He flatly denied one of these and attempted to explain the other as a payment for radio advertising. (R. 424–425; R.' 31–39.) The substantial nature of these specific receipts is shown by the approximate annual totals in the following table (R. 99–100, 107–109, 122, 124, 165, 169, 176, 182, 184–188, 389, 400, 409–410):

1946	$1,900
1947	3,500
1948	3,000
1949	5,700
1950	4,900

The jury were instructed that gifts were not taxable and that they must determine from the evidence whether the specific payments to petitioner were actually gifts or remuneration for services performed. They were also instructed that they must eliminate from consideration any assets of Mrs. Burdick in determining the increases in petitioner's net worth. (R. 453–460.)

ARGUMENT

1. Petitioner contends (Pet. 13–15) that the Government's net worth computation included assets belonging to his wife, i. e., the insurance policies, the bonds and the real estate, and that the computation was, therefore, insufficient to support the verdict. He argues that the only evidence to connect him with these assets was his own admission in the net worth statement submitted at Agent Gerson's request, and that such an uncorroborated admission is insufficient under the rule of *Calderon* v. *United States,* 207 F. 2d 377 (C. A. 9th), certiorari granted, 347 U. S. 1008, No. 25, this Term. A similar contention is urged with respect to the amount of cash at the starting point. The argument is without merit, for, regardless of the correctness of the rule laid down by the Court of Appeals for the Ninth Circuit in the *Calderon* case, the present record contains abundant independent evidence of the *corpus delicti* in the form of third-party testimony as to the numerous specific sums paid

to petitioner and unreported by him. Consequently, there is present in this record independent proof of the *corpus delicti* which the Ninth Circuit held to be fatally deficient in *Calderon*, and even under the rule of that case the question of the truth of petitioner's conflicting and evasive testimony as to cash on hand and his wife's ownership of certain assets (see, *e. g.*, R.' 39–57) was correctly submitted to the jury under adequate instructions (R. 453–460).

Petitioner argues further (Pet. 15–17) that the evidence established that the unreported specific payments were nontaxable gifts, and that the trial court should have so ruled as a matter of law. It is quite true that most of the Government's witnesses on this issue characterized their payments to petitioner as "gifts". But it is also clear from their testimony that he was rendering them valuable services annually through his legislative connections. (R. 100–105, 110–111, 122, 124–125, 168–169, 171–173, 181–182, 184, 188.) Furthermore, there is evidence that petitioner did not regard these payments as uncertain and purely gratuitous but expected them to continue, for, although his reported gross income for the years involved never exceeded $6,000 (Pet. 35),[5] he nevertheless stated that he had an annual income of $10,000 when applying in 1948 for a loan on

[5] The reference is to the opinion of the court below. Petitioner's returns, though introduced at the trial (R. 25), are not included in the record before this Court.

the house purchased in the name of his wife (R.' 4–6). Whether the payments to petitioner constituted compensation or gifts depended on the real intent of the donor and donee. *Smith* v. *Manning,* 189 F. 2d 345, 348 (C. A. 3d). See also *Commissioner* v. *Jacobson,* 336 U. S. 28, 50–51; *Bogardus* v. *Commissioner,* 302 U. S. 34, 40–42, 43, dissenting opinion 44–45; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 730. In view of the conflicting evidence as to the intent of the parties here, the issue was properly left to the triers of fact. The determination of the jury, which saw and heard the witnesses and which had been properly instructed on the issue (R. 455–460), is supported by substantial evidence and should not be disturbed.[6]

2. Equally without merit is the contention (Pet. 18–23) that the net worth statement and other evidence obtained from petitioner by Agent Gerson should have been suppressed because the agent did not warn him of his constitutional right against self-incrimination. The record does not support petitioner's assertion (Pet. 14, 19) that he was misled by the agent into believing that the investigation was for the purpose of determining his civil liability. There is no evidence of such deception on the part of Ger-

[6] There is no merit in the further contention (Pet. 17) that the evidence of wilfulness was insufficient. As the opinion of the court below points out (Pet. 34–35), the evidence on this issue was ample.

son. In fact the contrary appears, for petitioner was accompanied at the initial interview by his accountant, Willits, formerly a revenue agent for many years, and Gerson's introduction of himself as a representative of the Intelligence Unit (*supra*, p. 7) can only have meant to Willits that a criminal investigation was already under way. The admissibility of a defendant's extra-judicial admissions does not depend on whether or not he was warned of his constitutional rights. The test is whether they were made without compulsion or inducement. *Powers* v. *United States*, 223 U. S. 303, 312–314; *Wilson* v. *United States*, 162 U. S. 613, 621–624. See also *Montgomery* v. *United States*, 203 F. 2d 887, 892 (C. A. 5th); *United States* v. *Heitner*, 149 F. 2d 105, 107 (C. A. 2d), certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727; *United States* v. *Block*, 88 F. 2d 618, 620–621 (C. A. 2d), certiorari denied, 301 U. S. 690. There was no illegal search in this case. There was no seizure. There was no compulsion. There was no inducement. Petitioner's net worth statement, his records, and his answers to the agents' questions were all freely and understandingly given.

3. No showing has been made that the conduct of the prosecutor, now complained of in the petition (Pet. 23–27), can have had any

effect upon the verdict of the jury. As is clear from the petition itself the trial judge admonished the prosecutor and made it clear to the jury that they should disregard his remarks (see, *e. g.*, R. 450–452), and a similar warning was included at the outset of the court's charge (R. 453). Petitioner now attempts to magnify minor incidents in a protracted and vigorously contested trial. This was not a case such as *Berger* v. *United States*, 295 U. S. 78, 84, in which the prosecutor was guilty of putting words into the mouths of witnesses, misstating facts, assuming prejudicial facts not in evidence, suggesting that statements had been made to him out of court, bullying and arguing with witnesses. The Court of Appeals correctly concluded (Pet. 38) that no substantial rights of petitioner had been affected.

CONCLUSION

The decision of the court below is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1954.

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No. 622.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

DAVID H. MITCHELL, PETITIONER,

VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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No. _____.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

DAVID H. MITCHELL, PETITIONER,

VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner David H. Mitchell, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the United States District Court for the Western District of Missouri.

OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 122) is reported in 208 F. 2d 854.

JURISDICTION.

The judgment of the Court of Appeals was entered January 6, 1954 (R. 129). An order denying a petition for rehearing was entered February 8, 1954 (R. 143). An order staying mandate was entered February 13, 1954 (R. 143). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTIONS PRESENTED.

(1) Is trial court authorized in income tax prosecution, under Federal criminal law and constitutional guarantees of Due Process, to permit an inference of unreported income to arise from Government's evidence of increase in taxpayer's assets in excess of his reported income?

(2) Does Government fail to make a Net Worth criminal case of unreported income when it offers no testimony relative to taxpayer's receipts from gifts or inheritances during tax period involved, and offers evidence as to loans only from banks in which taxpayer kept deposits; or does the defendant have the burden of establishing such receipts from gifts, inheritances and loans?

(3) In income tax prosecution by Net Worth method, is taxpayer's net worth, taken from his financial statements and based on market values $150,000 in excess of cost, ad-

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missible to corroborate Government's closing Net Worth Statement, based on cost?

(4) Are the trial court's instructions correct when it computes taxpayer's income by comparing beginning net worth, based on cost, with ending net worth, based on market values $150,000 in excess of cost, and states that said purported income is evidence of willful tax evasion?

(5) Are income tax payments for twelve years prior to indictment period admissible to construct beginning net worth or for any other purpose, when Government agent testifies they have no bearing on such net worth, and when they create suspicion of tax evasion long prior to indictment period?

(6) Does Court of Appeals properly construe Rule 52(b) of Rules of Criminal Procedure when it establishes local rule of decision that failure of proof and errors in argument and instructions cannot be considered unless brought to the attention of the trial court; and, if so, what is the purpose and effect of Rule 52(b)?

(7) Does Court of Appeals properly construe Rule 52(a) of Rules of Criminal Procedure, and the controlling decisions of this Court, when it establishes local rule of decision that conviction will not be reversed for errors at trial if Court of Appeals believes guilt was established by "abundant competent proof"?

(8) Must record of trial convince appellate court that there was a miscarriage of justice and that defendant is innocent before it will reverse a conviction?

(9) Should conviction be reversed, despite defendant's failure to object at trial, when Government's closing argument includes reference to defendant's failure to testify and erroneous statement that trial court had ruled that

evidence, favorable to defendant, was "not the facts and the truth"; and when trial court instructs that testimony that disputed payments were not made is legally "negative testimony" which is "weak testimony" as compared with positive testimony of payment, and refuses to give defendant's requested instruction that negligence of third persons is a defense to criminal charge of income tax evasion?

STATEMENT.

Petitioner was convicted in the United States District Court for the Western District of Missouri on the first four counts (1945-1948), and acquitted as to the last two counts (1949-1950), of an indictment charging violations of Section 145(b) of the Internal Revenue Code, 26 U. S. C., in which it was alleged that petitioner knowingly filed false and fraudulent income tax returns for the calendar years 1945 through 1950 (R. 1-4, 79-80, 86). He was sentenced to total imprisonment of four years, and fined in the sum of $2[illegible],000 (R. 80-82); and upon appeal the judgment was affirmed by the Court of Appeals for the Eighth Circuit (R. 129). Rehearing was denied February 8, 1954 (R. 143).

Prosecution was based on two distinct theories: First —the Net Worth method of establishing income in excess of that reported in the tax returns; and Second—proof of specific items of alleged income not reported (R. 5). The Government's Net Worth conclusions appear in its Net Worth Statement (R. 9), which shows reported income during the four years for which petitioner was convicted averaging $32,000 per year, and, the Government contends, unreported income in almost the same amount. The specific omissions claimed by the Government average about $8,000 per year (R. 23-5, R. 124).

Certain items of alleged specific omissions which run through several years, including years for which petitioner was acquitted, may be disregarded. Relevant items of alleged specific omissions are (1) alleged receipts of $50 per week from taverns during 1945-8, in addition to reported income; (2) omitted rentals of $6,930 in 1945 from additional real estate; and (3) alleged receipts of $4,801.04 in 1947, representing the difference between 20% of gross receipts from the Three Bachelors Tavern and reported income, based on 10% of such receipts (R. 22-5). Receipt of the alleged $50 payments was sharply contested (R. 16-21, 41-47); proof of the alleged 20% receipts in 1947 was, at best, in balance (R. 105-6, 115-6, 51); and the omitted rentals in 1945 were admitted and explained (R. 44).

(1) Relative to Failure of Net Worth Proof.

The Government's Net Worth case as to 1949 and 1950 was met, and defendant was acquitted for said years, by proof of errors in bookkeeping and in preparation of petitioner's tax return (R. 52-55); and as to the other years, was met by proof of the bookkeeping and tax reporting system used by accountants and bookkeepers for petitioner during the relevant years, and of his lack of personal control or knowledge thereof (R. 43, 46, 48-51). In addition, petitioner contends the Government did not make a Net Worth case in that it offered no evidence relative to the source of the increases claimed by it, omitted all proof as to petitioner's gifts and inheritances during said period (R. 8-9), offered testimony of loans only from banks in which petitioner kept deposits and no proof as to loans from other sources (R. 15-16, 96, 102), and the Revenue Agents confessed complete inability to explain or identify the increases shown on Government's Net Worth Statement (R. 26-28).

(2) Relative to Use of Petitioner's Financial Statements.

In offering the Government's Net Worth proof, the Revenue Agent testified repeatedly that all assets listed in the Net Worth Statement were valued at cost, and that it would be a mistake to use market values in making such a computation (R. 8, 11, 26). In alleged corroboration of said proof, however, the Government was permitted to offer in evidence, over vigorous objection, figures as to petitioner's net worth in March, 1949, and February and October, 1950, as listed by him in financial statements given to a bank in order to obtain loans, despite testimony that such statements are made upon present market value rather than cost, and despite the direction on the face of said statements that real estate be listed "at actual market value." (R. 29-41, 11-14). Analysis of individual properties listed in the October, 1950, financial statement (R. 37, 38), as compared with the Government's Net Worth Statement for December 31, 1950 (R. 9), discloses that the former contains market values in excess of cost valuations in an amount exceeding $150,000. This appears as follows:

	Appellant's Financial Statement (R. 37, 39) (Market)	Government Net Worth Statement (R. 9) (Cost)
Oil and Gas Wells	$ 75,000.00	$ 23,699.77
1801 Holmes	18,000.00	18,531.75
1109 Broadway (1111 Broadway)	12,000.00	3,650.00
1117 Broadway	15,000.00	10,431.70
1114-16 Wyandotte	75,000.00	43,692.25
1217 Wyandotte	60,000.00*	63,225.53
1513 Main (1523 Main)	7,500.00*	6,500.00
711 West 12th St.	8,500.00	9,272.90
3732 Main	50,000.00	29,515.43
1617 Genessee	12,000.00	5,596.69
3501-09 Troost (Jewell Bldg.—R. 15)	62,557.35**	59,661.35
3114 Karnes	9,200.00**	3,446.71
405 East Armour (Richelieu Apt.—R. 15)	70,540.53**	46,412.91
Total	$475,297.88	$323,636.99

*Listed by appellant at "cost"

**Net value, after deducting mortgage to conform with Government values based on net equities (R. 15).

The trial judge instructed the jury that petitioner's income could be computed by comparing his 1945 beginning net worth (based on cost) with his 1950 ending net worth as contained in said market-value financial statements, and proceeded to compute said purported income as being approximately $60,000 a year (R. 72). This alleged income, based on unrealized market valuations, the judge compared with appellant's reported income averaging less than $40,000 a year. The trial judge concluded the comparison by stating that "there is no controversy about the financial statements," and that said comparison provides a "basis to determine whether * * * there was eva-

sion, an attempt * * * wilfully made, to defeat and evade a portion of his tax" (R. 70-72).

(3) Relative to Petitioner's Tax Payments Before Indictment Period.

Over objection, the trial court admitted in evidence a record of petitioner's income tax payments from 1933 through 1950, the payments before 1945 being admitted on the theory that they were used to construct the beginning net worth (R. 6). In ruling on the objection, the judge volunteered that, "the jury will be instructed, of course, to disregard it save only as it may relate to the net worth statement in the beginning of the period" (R. 7). The Revenue Agent subsequently testified that taxes paid prior to 1945 would have no bearing upon the Government's Net Worth Statement (R. 25).

The prior tax evidence was that petitioner had paid no income taxes prior to 1940; that taxes were paid for 1940 in the amount of $57.59; for 1941, in the amount of $429.02; and that two, three, and four thousand dollars were paid for 1942, 1943, and 1944, respectively (R. 6-7). After said testimony, the Government's next witness testified that prior to 1942 the petitioner had acquired the following properties: 1941 Packard automobile, costing $1,300 (R. 11); 1941 Willys automobile, costing $600 (R. 11); Hollywood Buffet, for which he paid $2,000 in 1939 (R. 14-15); real estate at 3708 Flora, for which he paid $1,000 in 1940 (R. 15); Buckhorn Bar, for which he paid $4,000 during "the thirties" (R. 14); real estate at 15th and Belmont, for which he paid $4,100 in 1927 (R. 15); residence at 3114 Karnes, purchased for $4,500 in 1941, partly by loan and mortgage (R. 15); and Richelieu Apartments, purchaser for $71,525.26 in 1941, partly by loan and mortgage (R. 15).

(4) Relative to Improper Argument and Instructions.

In support of its claim that petitioner received $50 a week from taverns, in addition to reported income based on a percentage of gross receipts, the Government called as witnesses Ruby McIntosh and John David McIntosh, tavern operators (R. 16, 18). Mrs. McIntosh testified that she paid $50 only intermittently, and the Government was permitted to cross-examine her, under the claim of surprise (R. 16). Mr. McIntosh testified that he did not remember exactly how much he paid petitioner, and did not have $50 payments in his records, although he kept records of everything he paid him; whereupon, the Government obtained leave to cross-examine, again claiming surprise (R. 19). On Government's cross-examination, he concluded, "I must have paid, I guess. I don't know" (R. 20). Both witnesses testified their leases called for $50 as "minimum rent" (R. 18, 20); and further stated that they did not report any $50 payments as deductions on their tax returns (R. 18, 20). Petitioner did not testify at the trial; but his wife testified that she was continuously with petitioner when percentage payments were made out of gross receipts by the operators at the end of each week, and that in her presence no $50 payments were made (R. 41-47). Relative to said testimony, the Government's closing argument contained the following:

> "* * * Here were this Mr. and Mrs. McIntosh * * * They * * * started to lie to you, and started to tell you they didn't pay him this $50.00 * * *. The Court let us cross examine on the theory they were unwilling and weren't telling the facts and the truth" (R. 64-65).

Relative to the same testimony, the trial court charged:

> "There was evidence on the part of the lessees that the $50.00 per month (*sic*) was paid * * *. There

was evidence on the part of some of the witnesses that they did not observe it was paid. That kind of testimony is what the courts would call negative testimony, and it is testimony that is not strong. It was weak testimony as compared with the positive testimony of witnesses who said the $50.00 per month (*sic*) was paid" (R. 73).

Relative to appellant's failure to testify, there was the following comment in Government's closing arguments:

> "Not one single solitary witness denied it (the alleged $50 payments which petitioner's wife denied were paid in her presence)" (R. 61).

> "I felt sorry for Mrs. Mitchell when she was on the stand the other day * * * here is a lawsuit where a man tries to save his own bacon by hiding behind the skirts of his own dear, little wife" (R. 62).

In commenting on testimony by petitioner's wife that she had negligently omitted to include certain rents in the tax returns (R. 44), and testimony as to mistakes of bookkeepers and accountants (R. 47-55), the Government's closing argument stated:

> "They can't * * * come into court and say * * * 'The bookkeeper came in and put it on. My wife came in and put it on. It is her fault not mine.' You can't escape in that way. If you could there would be no man ever prosecuted for tax evasion" (R. 65).

The Court refused (R. 65) petitioner's request for an instruction to correct the above-stated erroneous rule—that negligence of third persons would be no defense to a tax evasion prosecution—and instructed the jury generally (R. 70) on the issue of willfulness, without referring to the specific situation where, as here, the books, records, and tax returns were prepared by third persons (R. 44, 43, 46, 48-51).

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

(1) In sanctioning submission to jury of Government's Net Worth case.

(2) In sanctioning admission into evidence of petitioner's financial statements, and instructions thereon.

(3) In sanctioning admission into evidence of record of petitioner's income tax payments for twelve years prior to indictment period.

(4) In holding it could not consider erroneous instructions and argument, and failure of proof, where not brought to trial court's attention.

(5) In disregarding errors at trial, on theory competent proof was sufficient to sustain conviction.

(6) In sustaining conviction despite errors in instructions and argument.

(7) In affirming the judgment of the trial court.

REASONS FOR GRANTING THE WRIT.

(1) Conflict of Decisions and Constitutional Question Respecting Burden of Producing Evidence in Net Worth Prosecutions.

With unimportant factual differences, the legal situation here is comparable with that presented in litigation now pending before this Court, *Remmer* v. *U. S.*, No. 304, Certiorari Granted, November 16, 1953, 346 U. S. 884. In that case, the Government attempted to prove income tax evasion by the Net Worth method, comparing a Net Worth Statement prepared by Government agents for the end of

the period in question with a statement similarly prepared for the beginning of said period, and treating the net worth increase, so computed, as income. In the *Remmer* case, as stated by the Court of Appeals, the Government failed to prove the amount of cash in a safe deposit box at the beginning of the period, and thereby failed to exclude prior accumulated assets as a non-income source of the apparent net worth increase. 205 F. 2d 277, 287. In the instant case, there was *no* evidence offered relative to gifts and inheritances received by petitioner during the tax period, and the Government thereby failed to exclude those sources of non-income increase, which would account for the indicated net worth increase. Likewise, borrowed money as a source was not excluded, as the Government's evidence as to loans was not comprehensive, being limited to banks in which petitioner maintained deposits (R. 15-16, 96, 102).

In this case, as in the *Remmer* case, petitioner contends that the Government must prove unreported income by excluding non-income items, such as prior accumulations, gifts, inheritances, loans, etc. It is likewise necessary to exclude market valuations and to use cost values in making calculations, so as to exclude unrealized market value increases in computing the net worth increase which is considered to be income. See Point Two, *infra*. Many authorities rule that the Government cannot make a showing of increase in assets, and then throw upon a taxpayer in a criminal prosecution the burden of producing evidence that the increases are not income.

> "* * * The prosecution has the burden of establishing any money received as being true income." *Clawson* v. *U. S.*, (C. A. 9) 198 F. 2d 792, 794.

> "* * * the case should not have been submitted to the jury since it did not exclude the hypothesis that

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the funds * * * might have been from sources other than current business income." *Bryan* v. *U. S.*, (C. A. 5) 175 F. 2d 223, 227.

"In using this net worth test to determine discrepancies in the taxpayer's return of his income, care must be taken not to charge the taxpayer with income which may be a change in form of some capital which he has owned all the time or receipts such as gifts or inheritances which do not constitute taxable income." *U. S.* v. *Williams*, (C. A. 3) 208 F. 2d 437, 438.

See:

U. S. v. *Caserta*, (C. A. 3) 199 F. 2d 905, 907.
Demetree v. *U. S.*, (C. A. 5) 207 F. 2d 892, 893-4.
U. S. v. *Fenwick*, (C. A. 7) 177 F. 2d 488.
U. S. v. *Smith*, (C. A. 3) 206 F. 2d 905, 911.

The theory behind this rule has Constitutional dignity. Mere proof of increase in assets no more justifies an inference that such increases represent income than the equally reasonable conclusion that they represent loans, gifts, or inheritances. Since there is a reasonable hypothesis consistent with the taxpayer's innocence, the presumption of innocence forbids the jury to speculate on the matter and thus requires the issue to be withdrawn from the jury. *Bryan* v. *U. S.*, *supra*; *U. S.* v. *Fenwick*, *supra*, 492. This Court has ruled that under the Due Process clause of the Fifth Amendment, in a Federal criminal trial, the Government cannot, by means of an arbitrary presumption, escape the burden of proof and cast upon the defendant the obligation of exculpation. *Tot* v. *U. S.*, 319 U. S. 463. While this decision overturned an arbitrary statutory presumption, a judge-made rule freeing the Government from proving the necessary elements of its case, and casting the burden on a defendant to disprove the same, is

even more patently intolerable. *Krulewitch* v. *U. S.*, 336 U. S. 440, 456-8; *Morissette* v. *U. S.*, 342 U. S. 246, 275.

In Net Worth prosecutions, there exists a contrary line of authority, recently criticized by Chief Judge Hutcheson when he stated that some courts have been "more concerned with easing the difficulties attending the proof of guilt by (the Net Worth) method than with preserving unimpaired the constitutional rights of a defendant• * * *" *Demetree* v. *U. S., supra,* 894. While that opinion refrains from citing criticized decisions of other courts, the adverse comment clearly applies to the controlling decision in the Eighth Circuit, where the Court permitted the jury to convict a taxpayer although stating, "The evidence of the government does not exclude the possibility that the defendant had some substantial accumulation of capital (at the beginning of the tax period, or that he acquired during the period) a large amount of capital out of which he made the loans, investments and expenditures which the government contends reflect income." *Schuermann* v. *U. S.*, (C. A. 8) 174 F. 2d 397, 399. In other words, no proof was made that the increases were income. While the Court attempted to rationalize the decision by stating the untenable proposition that proof of increased assets "will justify a conclusion that a taxpayer had income which he deliberately failed to include in his return," the burden of the Court's remarks shows that the inference is primarily a rule of convenience to aid the prosecution. l. c. 399. The most extensively-considered authority contrary to the *Bryan-Fenwick* decisions, *supra,* is *Bell* v. *U. S.*, (C. A. 4) 185 F. 2d 302; but even in that case there was proof, contrary to the situation here, that the defendant had not received gifts or inheritances during the tax period. l. c. 307.

In considering whether the inference of income drawn from mere proof of increased assets is founded in reason or is an arbitrary guess, doing violence to the presumption of innocence, it is apparent that the only reason to prefer the possibility of income over the possibility of gifts, loans, inheritances, etc., is the loose, lay-reasoning that a person charged with crime is likely to come forth with proof of his innocence, if it exists and he is in possession of the same. Such reasoning, however, is forbidden in a criminal trial. As stated in the opinion of this Court, by Mr. Justice Roberts:

> "In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all facts essential to guilt. This is not permissible." *Tot* v. U. S., 319 U. S. 463, 469.

The Court may note that, while this question was presented to the Court of Appeals (R. 119), that Court held it was disabled from considering the same because it had not been presented to the trial court (R. 127). This was completely erroneous, since the trial court could not grant proper relief, being bound by the decision of the Court of Appeals in the *Schuermann* case, *supra*. It would have been worse than useless to request relief at the trial level, since petitioner would have been urging the trial judge to commit error, under the rule presently controlling him. Moreover, it is settled that a failure of proof should be corrected by an appellate court, even though not noted below, since

there can be no plainer or more substantial error than a failure of proof. *U. S.* v. *Norton*, (C. A. 2) 179 F. 2d 527; *U. S.* v. *Renee Ice Cream Co.*, (C. A. 3) 160 F. 2d 353; *Strickland* v. *U. S.*, (C. A. 5) 155 F. 2d 167. See Point Five, *infra*. The case was submitted to the jury on two theories, one of which was not made; and the judgment must be reversed, because on such a record the Court cannot know but what petitioner's conviction rested on the case not made. *Terminiello* v. *City of Chicago*, 337 U. S. 1, 5; *Shelton* v. *U. S.*, (C. A. D. C.) 165 F. 2d 241, 244-5; see *Kotteakos* v. *U. S.*, 328 U. S. 750, 765; Point Four, *infra*. This must be particularly true where, as here, the failure of proof affected the principal theory. As noted in the Statement, page 4, the alternative (specific omissions) theory involved relatively small amounts of money.

Having granted certiorari in the *Remmer* case, *supra*, where a similar question exists, and with the plain failure of proof in the instant case now before the Court, petitioner respectfully submits that the time is ripe for a solution to the conflict between the appellate courts on the burden of proof in Net Worth prosecutions, wherein conviction now depends upon the accident of residence; and further submits that the principles of the *Tot* case, *supra*, be applied to all criminal cases, without special advantages being granted to the prosecution of income tax charges.

(2) Erroneous Admission into Evidence and Instruction upon Petitioner's Financial Statements.

Petitioner presents herewith a strikingly erroneous misuse of purported evidence, preventing a fair trial, and likely to recur when income is computed by the Net Worth method. As previously noted, Net Worth calculations of income require that the Net Worth statements so used be

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prepared on cost valuations, so as to exclude from such calculations market value increases which are not income until realized. The Government agent testified to this fact (R. 8, 9, 11, 26), and it is a well established rule in Net Worth prosecutions. Schwerdtfeger, "Federal Prosecutions of Income Tax Cases," 40 Ky. L. J. 400, 404, n. 10. "Enrichment through increase in value of capital investments is not income in any proper meaning of the term." *Eisner* v. *Macomber*, 252 U. S. 189, 214-15.

Notwithstanding the settled basic requirement of valuation at cost in a prosecution of this character, the Government supported its Net Worth theory with evidence which directly conflicted with the cost premise, and the trial judge departed therefrom by attempting to calculate petitioner's income by comparing Government's beginning net worth, based on cost, with a closing net worth, based on market values containing at least $150,000 increase over the cost basis. The jury was misled and confused by said evidence into erroneously treating as taxable income mere unrealized increases in value of assets held—not sold or in any manner transferred—and into convicting petitioner for failing to report as income such increases which were not income.

In his Statement herein, page 7, petitioner has compiled a tabulation showing the extent of increased market values over cost, as contained in petitioner's financial statement of October, 1950, two months before the end of the six year period involved in this trial. The same tabulation was presented below (R. 121) and is unchallenged; but the opinion of the Court of Appeals erroneously stated, "there was no evidence that the (financial) statements included any increase in value as distinguished from income" (R. 126). Likewise, although petitioner twice objected to comparison of a Government's cost-value Net

Worth Statement with petitioner's financial statements, *based on market values, the trial judge overruled the objections*, and calculated purported income by means of such erroneous comparison (R. 12-14, 30, 72). The objections made to the evidence fully preserved petitioner's right to challenge the instructions. *U. S.* v. *Kelinson*, (C. A. 2) 205 F. 2d 600, 601. Only this Court can prevent petitioner's conviction, arrived at by the flagrantly erroneous method of treating $150,000 in market value increases as unreported income.

The error here complained of was expressly conveyed to the jury in the trial judge's instruction, wherein he deducted the (cost) net worth at the beginning of the period from the (market value) net worth at the end of the period, computed petitioner's income as being approximately $60,000 a year (R. 72), compared same with petitioner's reported income averaging some $35,000 a year (R. 71-72), emphasized that these calculations were based on petitioner's own financial statements concerning which "there is no controversy," and specifically urged the jury to consider said facts on the question of willful evasion (R. 72). It should be further noted that the $150,000 increase in market values over cost, ascertainable from said financial statements, fully explains the unreported increase of $25,000 a year, as computed above, and marks the difference between evidence supporting the Government's case and evidence supporting petitioner. See further calculation in petition for rehearing (R. 133).

The highly prejudicial error herein discussed cannot be passed over with the slighting comment that the same "could not be prejudicial" (R. 126) because there was sufficient proof, other than that here challenged, to present a question for the jury. Point Four, *infra*. Judgment should be reversed, to preserve petitioner's right to a fair trial, and

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to prevent further misuse of market value financial statements *in Net Worth computations of income.*

(3) Erroneous Admission into Evidence of Petitioner's Prior Tax Payments.

Petitioner presents herewith erroneously-admitted evidence creating improper suspicion of tax evasion in years long prior to the period for which petitioner was indicted, preventing a fair trial, and likely to recur in prosecutions of this nature. Over objection, testimony was admitted in evidence that petitioner paid no income taxes for the years 1933-1939, that he paid only $57.59 for 1940 and $429.02 for 1941, and that he paid more substantial taxes, amounting to two, three and four thousand dollars for 1942, 1943, and 1944, respectively (R. 6-7). Immediately after this testimony, there was testimony that prior to 1942 petitioner had acquired two automobiles, including a Packard; two taverns, costing $6,000; miscellaneous real estate costing $9,600; and a $70,000 apartment building, purchased in May, 1941, partly by loan and mortgage (R. 11, 14, 15). No comment need be made to establish the prejudicial nature in an income tax prosecution of such evidence, showing large acquisitions of property by a defendant who paid little or no taxes. The legal impropriety of such prejudicial matter relating to years long prior to the indictment period is well settled. *Wolcher* v. *U. S.*, (C. A. 9) 200 F. 2d 493, 497; *Boyer* v. *U. S.*, (C. A. D. C.) 132 F. 2d 12, 13.

The Government's purported justification for offering said prior tax payments in evidence was that they could be used to construct the beginning net worth (R. 6). Subsequently, the Government's Revenue Agent disavowed and disapproved the above justification, when he testified that taxes paid prior to 1945 would have no bearing upon the Government's Net Worth Statement (R. 25). On the

present record, no justification has been offered, nor can be offered, for the admission of this highly prejudicial matter.

In reviewing this objection (R. 127), the Court of Appeals demonstrated the recurring nature of this type of alleged proof in Net Worth prosecutions, by relying on three recent decisions in the Eighth Circuit, alone. *Leeby* v. *U. S.*, 192 F. 2d 331; *Hanson* v. *U. S.*, 186 F. 2d 61; *Schuermann* v. *U. S.*, 174 F. 2d 397. Petitioner does not argue with the holding in the *Hanson* case, *supra*, where defendant's failure to pay taxes in prior years was admitted in rebuttal to his contention that he had accumulated extensive assets prior to the tax period involved. l. c. 66. In the instant case, the occasion for such rebuttal never arose, since petitioner during trial agreed with the Government as to his beginning net worth (R. 14). The *Schuermann* case, *supra*, is not in point, because there was no prejudice from the introduction of the prior tax returns, there being no testimony of accumulated assets during said period. l. c. 399. In *Leeby* v. *U. S.*, *supra*, the evidence of nontaxable returns (l. c. 333) was admissible to rebut the disputed evidence by defendant that he had accumulated substantial assets during said years (l. c. 332); and petitioner need not argue with the result of that case. The Court there stated in dictum that the prior returns would have some bearing on defendant's intent (l. c. 334), but this dictum is inconsistent with the trial court's instructions in that case which were favorably quoted, to the effect that the defendant's prior returns are presumed to be in compliance with the law, and that there is no charge of evasion during said years. l. c. 333. The question of fraudulent intent cannot sustain the introduction of such evidence in the instant case, since there is a break of four years between the last year for which returns are suspiciously small and

the first year of the indictment. This break is too long to support use of said evidence on the question of intent, even assuming that prior returns are sometimes admissible on said theory. *Wolcher* v. *U. S., supra, Boyer* v. *U. S., supra.*

One statement in the *Leeby* case, *supra,* should be considered. That is the statement, quoted in the present opinion (R. 127), that, "In estimating defendant's income * * * on the net worth basis, the witness considered the question of his income or want of income prior to 1944 and we think the testimony was admissible for that purpose * * *." l. c. 333. This vague statement finds no support in the Court's reasoning, and appears to be a conclusion on a question of accounting, induced by the opinion of the Government's "expert witness," or by counsel's interpretation thereof. In the present case, this erroneous statement is clearly answered by the Government's witness who testified that the prior tax payments had no bearing on beginning net worth (R. 25). The Court's erroneous statement in the *Leeby* case, *supra,* should be corrected on the basis of the present record, so that the Government will not have a meaningless pretext for introducing prejudicial evidence into all Net Worth prosecutions. For this reason, judgment should be reversed.

(4) Erroneous Application of Harmless Error Rule.

Rule 52(a), Federal Rules of Criminal Procedure, 18 U. S. C. (1946), provides that, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The leading authorities interpreting and applying this "harmless error" rule likewise date from 1946. *Bollenbach* v. *U. S.,* 326 U. S. 607; *Bihn* v. *U. S.,* 328 U. S. 633; *Kotteakos* v. *U. S.,* 328 U. S. 750. This Court recently stated the harmless error rule in the following

cautious language: "Where it is made to appear affirmatively * * * that the alleged error could not affect the result, such errors may be disregarded even in the review of criminal trials." *Brown* v. *Allen*, 344 U. S. 443, 460. The Court of Appeals for the Eighth Circuit, however, has made sweeping use of the harmless error rule in the instant case, in violation of the above authorities, and of petitioner's right to a fair, substantially unprejudiced trial.

The most that can be said for the Government's side of this case is that "the scales were quite evenly balanced"; certainly fair analysis would not reveal an "open and shut" case. *Bihn* v. *U. S., supra*, 638. See Statement, pages 4-6 herein. The acquittal as to two years (R. 80) indicates the jury was in some doubt. *U. S.* v. *Wicoff*, (C. A. 7) 187 F. 2d 886, 891. Since petitioner is not relying on mere formalities or technicalities, the burden of establishing an overwhelming case such as would override the errors is upon the Government. *Kotteakos, supra*, 760. This Court has clearly advised the courts of appeal that the Government cannot escape reversals for substantial errors by claiming that there was proof, apart from the errors, which would support a conviction. *Bollenbach, supra*, 614; *Kotteakos, supra*, 765. "Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government." *Bihn* v. *U. S., supra*, 638-9. "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty * * * it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused,

however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach* v. *U. S., supra*, 615. See *Meeks* v. *U. S.*, (C. A. 9) 163 F. 2d 598, 602.

Despite the above guiding rules, the Court of Appeals departed completely from said standards in ruling that the improper admission and use of appellant's financial statements (Point Two, *supra*) "could not be prejudicial" because "there was abundant competent proof aside from these questioned exhibits" to support the conviction (R. 126). In addition, the Court confused the bare minimum of evidence sufficient to prevent a directed verdict with the overwhelming evidence necessary to override substantial error. This clear distinction, commented upon by Judge Frank in his dissenting opinions in *U. S.* v. *Rubenstein*, 151 F. 2d 915, 921-2, and *U. S.* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 650, was forgotten by the Court when it seized upon petitioner's quite proper failure under the circumstances to move for a directed verdict as an element in finding the errors at trial to be harmless (R. 126-7).

The errors complained of, and their substantiality, are discussed at length under petitioner's Points One, Two, Three, and Six, and will not be repeated under this topic. Petitioner concludes that the errors are substantial, prejudicial, and destructive of his right to a fair trial, that the harmless error rule cannot properly give appellate courts pause in reversing this conviction, and that the clear misconstruction of Rule 52(a) by the Court below should be corrected by this Court.

(5) Conflict of Decisions and Erroneous Application of Plain Error Rule.

Rule 52(b), Federal Rules of Criminal Procedure, 18 U. S. C. (1946), provides that, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." Despite this controlling rule of procedure, the Court of Appeals for the Eighth Circuit has ruled that it cannot consider the sufficiency of the evidence to sustain the conviction unless raised below (R. 127); and, likewise, that erroneous instructions and arguments to the jury will not be considered unless "objections were made or exceptions saved" in the trial court (R. 128). These rulings are now the settled law of said Circuit under recently decided cases: *Leeby* v. *U. S., supra; Finnegan* v. *U. S.*, 204 F. 2d 105; *Myres* v. *U. S.*, 174 F. 2d 329, 339.

Except for incidental quotation in a case involving Rule 52(a) (*Echert* v. *U. S.*, 188 F. 2d 336, 341), Rule 52(b), permitting plain error to be noticed and corrected, though not raised below, has not even been honored by citation by the Court of Appeals for the Eighth Circuit. 2 Shepard's Federal Reporter Citation 2128; Supplement, January, 1954, 347, tabulating citations of Rule 52(b) by this Court and the other Federal Courts, reveals that since its adoption in 1946, the Rule has been cited in fifty decisions. This Court and all courts of appeal except those for the Fourth, Sixth, and Eighth Circuits, have applied the Rule. It is apparent that, if the Rule gives appellate courts a measure of discretion, the courts of appeal have been using widely varying standards of discretion, and that the latter courts (C. A. 4, C. A. 6 and C. A. 8) have been applying standards which effectively abolish the Rule. Petitioner urges this Court to use this case as an appropriate method

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for bringing an end to such illegal and inharmonious standards.

In his petition for rehearing, petitioner cited decisions of this Court and the courts of appeal from all but the Fourth, Sixth, and Eighth Circuits, in which, contrary to the announced rule in the Eighth Circuit, consideration was given to alleged errors in instructions and argument, though no objection was made thereto at trial (R. 139-140). The Court refused a rehearing (R. 143), thereby refusing to join harmoniously with this Court and the other eight circuits.

In the instant case, the Court of Appeals for the Eighth Circuit gave its initial express consideration to Rule 52(b); and adopted a limitation from the Fourth Circuit (which has never cited the Rule) which effectively destroys the Rule. The Eighth Circuit adopted the following language, "We exercise the power to notice plain error not assigned (*sic*) only where necessary to prevent a miscarriage of justice * * *'" (R. 129). In paraphrasing Rule 52(b), said Court likewise added the qualification that the error, to be considered though not presented to the trial court, must be "plain error affecting substantial rights *and resulting in a miscarriage of justice*" (R. 129), the words italicized by us not being contained in the Rule. Thus, unless convinced of an appellant's innocence—an unusual situation, surely, after indictment, trial and conviction by a jury—the Court of Appeals for the Eighth Circuit will refuse to consider the error. The area of discretion is thereby severely limited in a manner which mocks the Rule.

In considering the evidence apart from the errors relied upon, and in refusing to consider the nature of said errors, the Eighth Circuit failed to note that the only issue under Rule 52(b)—distinguishing it from Rule 52(a)—is

whether the errors relied upon but not raised below are "plain" errors; *i. e.*, whether such errors are clear, or too obscure for the trial court to understand and recognize, without being told. Rule 52(a), (b), 18 U. S. C. Where the error is "plain," the trial court's responsibilities for fair conduct of the trial do not cease merely because no objection is heard. The situation is not uncommon when "the trial judge should have stopped counsel's discourse without waiting for an objection." *Viereck* v. *U. S.*, 318 U. S. 236, 248.

The issue under Rule 52(b) is whether the errors complained of are "plain"; this requires consideration of the nature of the specific errors urged upon the appellate court. In direct opposition to the practice indicated by the Rule, the Court below refused to look at the cited points of error in argument and instructions, and directed its attention toward all matters in the Record *except* the errors cited (R. 128-129). Then, acting as a jury and concluding that guilt "was established beyond a reasonable doubt by substantial competent evidence" (R. 129), the Court brushed aside eight of the eleven issues presented in petitioner's brief (Points I(b), I(c), II, IV(b), IV(c), V(a), V(b), V(c)—R. 119-120). The seriousness and substantiality of the erroneous instructions on petitioner's financial statements, and the failure of proof as to the Net Worth method have already been indicated (Points One, Two, *supra*). The other matters are briefly stated under Point Six, *infra*. For the procedural error of the Court of Appeals in refusing to consider the nature of the cited errors, and because of the plainness and substantiality of those errors, as discussed elsewhere, the judgment should be reversed.

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(6) Erroneous Instructions and Argument.

Relative to the sharply disputed evidence as to petitioner's alleged receipt of payments of $50 a week from taverns, in addition to reported income of a percentage of gross receipts (R. 16-21, 41, 47), and to Government's cross-examination of the tavern operators on the claimed theory of "surprise" (R. 16, 19), the Government's closing argument erroneously and prejudicially contained the following: "Here were this Mr. and Mrs. McIntosh * * *. They * * * started to lie to you, and started to tell you they didn't pay this $50.00 * * *. The Court let us cross examine on the theory they were unwilling and weren't telling the facts and the truth" (R. 64-65). The argument as to the theory on which the trial court allowed cross examination attributed to the trial judge the position of invading the province of the jury. *McNutt* v. *U. S.*, (C. A. 8) 267 Fed. 670, 673. Such an emphatic conclusive statement, if made by the judge, would be reversible error even though he also stated that the jury is the ultimate trier of the facts. *Quercia* v. *U. S.*, 289 U. S. 466; *Cook* v. *U. S.*, (C. A. 8) 14 F. 2d 833. The jury was justified from these comments, acquiesced in by the trial judge, to conclude that during the course of the trial a final decision had been made by the judge that "the facts and the truth" were that said payments had been made.

Supporting the above erroneous and prejudicial concept, the trial judge instructed that Mrs. Mitchell's testimony that such payments were not made in her presence, and that she was always present when profits were divided between petitioner and the operators (R. 41-47) "is what the courts would call negative testimony, and it is testimony that is not strong. It was weak testimony as compared with the positive testimony of witnesses who said the $50.00 per month (*sic*) was paid" (R. 73). This

instruction on "negative testimony," without precedent in any reported Federal criminal trial, was clearly erroneous. *State* v. *Davies*, 101 Ohio St. 487, 129 N. E. 590. Even in a civil case, the instruction was improper, on the facts herein. 42 Harvard Law Review 422, 425; 2 Wigmore on Evidence (3rd Ed.), Sec. 664, pages 781-2; *U. P. R. Co.* v. *Burnham*, (C. A. 10) 124 F. 2d 500, 502; *Eiseman* v. *Penn. R. Co.*, (C. A. 3) 151 F. 2d 222. Under no circumstances should instructions on negative evidence, as artificially light-weight testimony, be permitted in criminal trials in Federal Courts. 2 Thompson on Trials, Sec. 2417, pp. 1763-4.

In view of the testimony by Mrs. Mitchell that the alleged $50 payments were not made in her presence, the Government's argument that, "Not one single solitary witness denied it" (R. 61) must be taken as a reference to the possibility that payments were made to petitioner secretly, out of his wife's presence. As such, and since petitioner did not testify, it was an illegal reference to his failure to testify. *Barnes* v. *U. S.*, (C. A. 8) 8 F. 2d 832, 834. Another such illegal reference is contained in the argument that, by having his wife testify, petitioner was "hiding behind the skirts of his own, dear little wife" (R. 62). This is reversible error. *Wilson* v. *U. S.*, 149 U. S. 60; *DeMayo* v. *U. S.*, (C. A. 8) 32 F. 2d 472, 475.

In commenting upon testimony by petitioner's wife that she had negligently omitted to include certain rents in the tax returns (R. 44), and testimony as to mistakes of bookkeepers and accountants (R. 47-55), the Government's closing argument stated:

> "They can't * * * come into court and say * * * 'The bookkeeper came in and put it on. My wife came in and put it on. It is her fault not mine.' You can't escape in that way. If you could there would be no man ever prosecuted for tax evasion" (R. 65).

This argument makes petitioner criminally liable for the negligence of his agents, and was clearly erroneous. *Lurding* v. *U. S.*, (C. A. 6) 179 F. 2d 419, 421. A considerable portion of defendant's evidence concerned itself with the fact that petitioner did not personally control or have knowledge of his bookkeeping and tax-reporting system (R. 43, 46, 48-51). In view of said testimony, and the aforesaid improper argument, it was reversible error for the trial court to reject petitioner's suggested instruction (R. 65), correcting said argument and informing the jury of the law applicable to said defense. *Lurding* v. *U. S.*, *supra*.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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March, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 622

DAVID H. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 122-129)[1] is reported at 208 F. 2d 854.

JURISDICTION

The judgment of the Court of Appeals was entered January 6, 1954 (R. 129-130), and a petition

[1] References to the printed record will be designated, "R". References to the reporter's transcript of the evidence, which has been certified to this Court, will be designated "Tr.", and the page numbers used will be the red numbers at the top of each page.

for rehearing was denied February 8, 1954 (R. 143). The petition for a writ of certiorari was filed March 5, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence supporting the Government's net worth computation, the sufficiency of which was not challenged in the trial court, was sufficient to prove wilful attempted evasion of income taxes.

2. Whether the trial court erred in permitting the jury to consider three financial statements prepared by the petitioner in 1949 and 1950 in which some of the assets were valued at the market instead of at cost.

3. Whether the trial court erred in permitting the Government to introduce evidence of income taxes paid by petitioner in previous years in order to reconstruct his net worth at the starting point of the computation.

4. Whether such grave errors were committed in the prosecutor's argument and in the trial judge's charge as to require the Court of Appeals to exercise its discretion to notice plain error in the absence of a trial objection.

STATUTE AND RULES INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

(b) *Failure to collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1946 ed., Sec. 145.)

FEDERAL RULES OF CRIMINAL PROCEDURE:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to

adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On May 8, 1952, a six-count indictment was filed against petitioner in the United States District Court for the Western District of Missouri charging him with wilful attempts to evade and defeat his income taxes for the years 1945 through 1950 by filing fraudulent returns, in violation of Section 145(b) of the Internal Revenue Code. (R. 1-4.)

The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		*Corrected*	
	Income	*Tax*	*Income*	*Tax*
Count I (1945)	$18,297.52	$ 5,882.69	$77,221.17	$48,650.79
Count II (1946)	44,836.04	20,612.03	57,240.11	29,212.58
Count III (1947)	22,716.92	7,810.41	69,186.82	38,670.43
Count IV (1948)	43,615.47	13,927.94	67,039.89	26,462.02
Count V (1949)	44,139.16	14,186.00	61,412.51	23,218.77
Count VI (1950)	42,954.37	14,075.24	68,358.14	28,153.24

After a jury trial lasting seven days petitioner was found guilty on the first four counts and not guilty on the last two. (R. 79-80, 85-86.) On September 23, 1952, concurrent sentences of imprisonment for four years were imposed under each of the first three counts, and petitioner was fined $10,000 on the first count and $5,000 on both the second and third counts, a total of four years' imprisonment and $20,000 in fines. Imposition of sentence was suspended as to the fourth count and petitioner was placed on probation for five years, beginning with his release from prison and conditioned on settlement or compromise of his tax liabilities. (R. 80-82.) The Court of Appeals affirmed. (R. 122-130.)

The evidence to support the verdict may be summarized as follows:

During the years involved in this case, petitioner owned or acquired interests in a number of taverns and bars. (R. 9, 97-99.) Some of these he leased

to operators under agreements whereby he was to receive either 10% or 20% of the gross receipts plus $50 a week rental. (R. 16-21, 105-108.) Each Saturday night petitioner and his wife visited the various locations, opened the cash register and read the total receipts for the week, subtracted the expenses (which had been paid out of the register by the operator), divided the profit with the operator, and reset the register for the following week. Petitioner's wife would record the total receipts and expenses in a day book kept at the location. (R. 41-47, 111-113.)

Petitioner also owned or acquired large interests in real estate (R. 9, 15, 99-102), equities in several oil wells, and a small amount of stocks and bonds (R. 9). He reported gambling winnings for one year. (R. 102-103.)

During the investigation of petitioner's returns for the years involved, Internal Revenue Agents had numerous conversations with him concerning his income and his assets. (R. 102-103; Tr. 96, 102, 109, 117, 120, 123, 127, 150, 153, 158, 162, 175, 229, 412, 416-417, 474-478, 487, 498-499.) They talked to over a hundred persons with whom petitioner had had business dealings. (Tr. 46-50.) They discovered that he had purchased over a thousand cashier's checks in amounts varying from $10 to $40,000. (Tr. 58-59.) And they were unable to trace the source of large amounts of cash which he had used to pay for various real estate acquisi-

tions. (Tr. 161-187.) For instance, of $45,000 used to purchase the Rasbach Hotel in 1945, the agents were unable to trace the source of $27,000 (Tr. 161-164), and they were unable to trace any of approximately $18,500 used to purchase another property in 1947 (Tr. 176-178).

In view of the fact that petitioner had virtually no records for 1945, 1946 and 1947, very few records for 1948, and incomplete records for 1949 and 1950, the Government presented proof of his correct net taxable income for all these years by computing the annual increases in his net worth and adding thereto his proven non-deductible annual expenditures. (R. 8-9, 55.) There was no dispute as to petitioner's net worth at the starting point, December 31, 1944. Counsel stipulated that it was $146,924.41 (R. 9-14.) Nor was there any dispute as to the ownership or valuation of the items included in the Government's computation. All items included therein were valued, not at market value, but at the original cost to petitioner. (R. 11.) In fact, the Government did not use the inflated values which petitioner had ascribed to some of these properties in his returns.[2] The Government included only those expenditures which could be verified, and the net worth computation, therefore, shows a smaller increase in assets than it would

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[2] He appears to have used market value in his returns, thus permitting him to claim considerably larger depreciation deductions. (Tr. 95-98, 111-112, 476, 741-742.)

have had petitioner's own figures been used. (R. 97-99; Tr. 111-112.) The computation revealed the following as to petitioner's net income (R. 9):

Year	*Reported*	*Corrected*	*Unreported*
1945	$18,297.52	$59,937.67	$41,640.15
1946	44,836.04	64,343.44	19,507.40
1947	22,716.92	64,716.40	41,999.48
1948	43,615.47	65,778.37	22,162.90
1949	44,139.16	61,132.73	16,993.57
1950	42,954.37	68,817.05	25,862.68

During the year 1945 petitioner sold none of the assets which he admittedly had at the starting point date, his cash on hand increased over $30,000, and he spent over $50,000 in acquiring two properties. Yet he reported taxable income of only $18,297.52. During the year 1947 petitioner spent approximately $68,000 in the acquisition of two new properties and reported taxable income of only $22,716.92. The difference cannot be accounted for by sale of other properties or use of cash on hand. (R. 9; Tr. 214-215.)

In addition to the net worth computation the Government proved substantial specific items of taxable income which had been received by petitioner but not reported in his returns. The $50 weekly rent received from the tavern operators had not been reported, and rentals received from certain other properties had also been omitted. (R. 22-25, 103, 108-109.) A large part of the Government's case was devoted to these specific items (Tr. 218-390), and the prosecutor opened his argument

to the jury by recapitulating this evidence (Tr. 729-737). The totals of the unreported items for the years still involved in the case are (R. 108-109):

1945	$14,859.96
1946	5,485.00
1947	9,217.52
1948	3,484.00

The Revenue Agent who had conducted the investigation stated that he did not know the source of the additional income shown by the net worth computation over and above these specific items. (R. 26-27.)

Petitioner did not take the stand himself. The defense sought to counter the Government's specific items of proof by denying receipt of some of these items and explaining the failure to report others. The defense also sought to explain the additional unreported income shown by the Government's net worth computation as the unintended result of petitioner's inadequate bookkeeping system.

Petitioner's wife testified that she had accompanied him on his weekly rounds of the taverns, that she had never seen him receive the $50 rental from any of the operators, and that she had omitted certain other income from his returns through oversight. (R. 41-47, 111-113.) Receipt of one other specific item amounting to approximate-

ly $4,800 was also challenged. (R. 51, 105-106, 115-116.)

The essence of the defense was that the Government had failed to prove that petitioner had wilfully failed to report all of his taxable income, that his "homespun" bookkeeping system had been inadequate for his greatly increased assets, and that the large omissions shown by the Government's net worth computation could be accounted for by the errors of his bookkeepers and accountants. (Tr. 510, 514, 517.) Nelson, a certified public accountant, testified that he had analyzed petitioner's books for 1949 and 1950, during which two years the books were fairly complete. His analysis showed that petitioner had actually received taxable income closely approximating that shown by the Government's computation. Nelson testified that the failure to report this income was attributable to the errors of the bookkeepers. (R. 52-56.) The defense asked the jury to assume that similar errors accounted for the omissions in 1945, 1946, 1947 and 1948, for which years Nelson was unable to make an analysis because of lack of records. (R. 55; Tr. 517, 760-763.)

The sufficiency of the Government's case was not challenged by a motion for a judgment of acquittal, either at the close of the Government's case or at the close of all the evidence. (Tr. 508, 727.)

ARGUMENT

1. Petitioner contends (Pet. 2, 11-16) that the Government failed to prove unreported taxable income by its net worth computation because it failed to exclude the *possibility* that the increases could have come from gifts, loans or inheritances. He argues that, although he failed to raise this point in the trial court, there is an essential failure of proof constituting plain and substantial error which should have been noted by the Court of Appeals. And, despite the fact that the Government also relied on proof of substantial specific items of unreported income (the sufficiency of which is not challenged), he urges that the conviction should be reversed because the jury may have relied upon the Government's net worth proof.

There can be no doubt that the Court of Appeals may, in its discretion, notice the clear failure of the Government to prove an essential element of its case, even in the absence of proper objection in the trial court. But petitioner was hardly in a position to invoke the exercise of that discretion in this case. Although the defense was clearly aware of the significance of loans, gifts or inheritances (Tr. 407-410), there was no suggestion at any time during the trial that the unreported income was traceable to such non-taxable sources. Instead, the defense frankly admitted failures to report taxable income and sought to explain them

as bookkeeping errors. (See *supra,* pp. 9, 10, and Tr. 769-772.) After claiming innocent failure in the trial court, petitioner cannot turn around on appeal and claim that there was no failure at all.

Furthermore, even apart from these admissions by the defense, there was no deficiency in the Government's net worth proof. Concededly the burden rested upon the Government to establish that the increases came from current taxable income. In this case, it is true, the Government did not exclude the *possibility* that the increases had come from gifts, devises or loans. But it was not incumbent on the Government to exclude all speculative possibilities of innocence. In order to establish a *prima facie* case the Government had to present evidence which could convince a reasonable mind that the only reasonable *probability* was that a substantial portion of the increases was attributable to unreported taxable income.[3] The test on appeal of the sufficiency of the Government's evidence is whether reasonable minds, regarding that evidence in the light most favorable to the Government, could conclude beyond a reasonable doubt that petitioner had wilfully failed to report substantial portions of his taxable income. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 254; *Glasser* v. *United States,* 315 U. S. 60, 80;

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[3] The Government was not, of course, required to prove the exact amount of unreported income. *United States* v. *Johnson,* 319 U. S. 503, 517.

Gorin v. *United States,* 312 U. S. 19, 32; *Pierce* v. *United States,* 252 U. S. 239, 251-252; *Stilson* v. *United States,* 250 U. S. 583, 588-589; *Curley* v. *United States,* 160 F. 2d 229, 232-233 (C.A.D.C.), certiorari denied, 331 U. S. 837; *Gendelman* v. United States, 191 F. 2d 993, 995 (C.A. 9th), certiorari denied, 342 U. S. 909; *Stoppelli* v. *United States,* 183 F. 2d 391 (C.A. 9th), certiorari denied, 340 U. S. 864. The cases upon which petitioner relies,[4] in which the jury had been permitted to draw an arbitrary inference from the facts proved, are not here in point.

Judged by the above test, the Government's net worth proof was sufficient to take the case to the jury. The computation showed unexplained increases in petitioner's net worth ranging from $17,000 to $42,000 for each of the six years involved in the investigation. But the Government's case did not rest, as petitioner asserts (Pet. 13), upon "mere proof of increase in assets." The Government proved definite sources of income, specific items of unreported income, and an intensive investigation which had revealed no gifts or other non-taxable receipts to account for the increases in petitioner's wealth. Information as to the existence of unknown or secret gifts was peculiarly within the knowledge and control of the petitioner and could easily have been presented by him. To

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[4] See *Tot* v. *United States,* 319 U. S. 463; *Morissette* v. *United States,* 342 U. S. 246.

prevail on this ground the defendant should be required at least to put in issue at the trial the receipt of specific gifts. In the circumstances of this case, where no such effort was even suggested at the trial, the jury could reasonably infer that the increases were not attributable to non-taxable sources. This Court has said (*Rossi* v. *United States*, 289 U. S. 89, 91-92):[5]

> The general principle * * * is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control.

Certainly, if a jury may weigh the failure of an accused murderer to explain recent possession of property of the deceased,[6] if it may draw an inference of guilt from the unexplained possession of contraband narcotics,[7] it may also give weight to the failure of an accused taxpayer to produce evidence of non-taxable sources of income in explanation of large increases in his net worth discovered

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[5] See also *United States* v. *Fleischman*, 339 U. S. 349, 360-364; *Morrison* v. *California*, 291 U. S. 82, 88-91; *Casey* v. *United States*, 276 U. S. 413, 418.

[6] *Wilson* v. *United States*, 162 U. S. 613, 619.

[7] *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Dear Check Quong* v. *United States*, 160 F. 2d 251, 252-253 (C.A.D.C.).

[8] *Bell* v. *United States*, 185 F. 2d 302, 309 (C.A. 4th), certiorari denied, 340 U. S. 930; *Schuermann* v. *United States*, 174 F. 2d 397, 399 (C.A. 8th), certiorari denied, 338 U. S. 831.

by the investigating agents.[8] The force of a *prima facie* case may not be defeated by "skilful concealment" (*United States* v. *Johnson,* 319 U. S. 503, 517-518), or by mere conjecture and speculation as to the possible existence of non-taxable sources (*Banks* v. *United States,* 204 F. 2d 666, 672, (C.A. 8th), certiorari denied, 346 U. S. 857). Here, where the probative force of the Government's evidence has the support of both courts below and of the jury, there is no occasion for further review by this Court. *United States* v. *Johnson, supra,* p. 518.

There is no conflict on this point with the two cases on which petitioner so heavily relies (Pet. 12-14), *Bryan* v. *United States,* 175 F. 2d 223 (C.A. 5th),[9] and *United States* v. *Fenwick,* 177 F. 2d 488 (C.A. 7th). In each of these cases there was an incomplete investigation and the Government was forced to admit that there might well be assets which it had not discovered. See 175 F. 2d at 226, and 177 F. 2d at 491. But here there was no comparable defect; the jury could properly infer, as it did, that the large increases in net worth uncovered by the agents, which petitioner at no time claimed were derived from non-taxable sources, actually represented current income.

2. Petitioner contends (Pet. 2-3, 11, 16-19) that it was prejudicial error to permit the jury to consider the three financial statements which he pre-

[9] Affirmed on another ground, 338 U. S. 552.

pared in 1949 and 1950, for the reason that the assets therein were valued, not at cost, but at the market. The argument is without merit.

The three statements were submitted at the very end of the Government's case in corroboration of the completed net worth computation, and it was made clear that market values were used in them. (R. 29-41.) On the other hand, it was repeatedly impressed upon the jury, both by the prosecution and by the defense, that the Government's net worth computation, in order to present a true picture of petitioner's income, must necessarily value his assets at cost. (R. 11-15, 97-102; Tr. 78, 85-86, 101, 105, 115, 119, 122, 126, 129, 169, 402-403, 415-416, 740, 774-775.) The absence of any prejudice is demonstrated by the fact that petitioner was acquitted on the counts covering the years 1949 and 1950 in which the financial statements were prepared. The net worth computation, the results of which petitioner did not challenge but only sought to explain at the trial, provided ample evidence of unreported income exclusive of the financial statements, and it bore out the judge's remark to the jury that the evidence indicated petitioner had a net income of approximately $60,000 a year. (Cf. R. 9 and 71-72.) The calculation upon which petitioner now relies (Pet. 18) is fallacious in that it fails to take into consideration non-deductible expenditures of from $11,000 to $29,000 a year

which the Government properly included in the net worth computation. (Cf. R. 9 and 133.)

3. Equally without substance is the argument (Pet. 3, 11, 19-21) that the trial court erred in admitting a record of the taxes paid by petitioner in the years prior to 1945.

Evidence which incidentally establishes the commission of another wrongful act is admissible if relevant to establish the offense charged. *Wolcher* v. *United States,* 200 F. 2d 493, 497 (C.A. 9th). Since this was a net worth case the amount of income earned and taxes paid by petitioner in the years prior to the years involved in the indictment was obviously relevant to the establishment of his net worth at the starting point,[10] and the exhibit in question was introduced by the Government for that purpose because defense counsel would not concede the beginning figure. (R. 6-7.) A little later, however, the defense abandoned this position and did concede that the starting point net worth was $146,924.41. (R. 11-14.) The purpose for which the exhibit was originally admitted was clearly understood by defense counsel. (Cf. R. 25 and Tr. 391-393.) Since there was no issue before the jury as to the starting point, no instruction was either requested or given on the use to be made of the tax payment exhibit.

[10] The Government's witness was not talking about the starting point (see Pet. 8, 21) when he said that prior tax payments had no bearing on the net worth computation. (Tr. 391-393.)

4. Petitioner contends (Pet. 3-4, 11, 27-29) that several errors were committed in the prosecutor's closing argument to the jury and in the court's charge. Error in the argument is alleged (1) in the prosecutor's statement that the court allowed him to cross-examine two Government witnesses on the ground that they were not telling the truth; (2) in the statements that no witness denied petitioner's receipt of the $50 payments, and that petitioner was hiding behind the skirts of his wife; and (3) in the statement that petitioner could not escape by putting the blame on his bookkeepers. Error in the court's charge is alleged (1) in the statement that the testimony of petitioner's wife that she had never seen him receive the $50 payments was negative and weak testimony as compared with positive testimony to the contrary; and (2) in refusal to give a requested instruction that there is a legal difference between a taxpayer who makes out his own return and one whose return is made out by another. We submit that each of these isolated passages, with the possible but harmless exception of the court's comment on the weakness of Mrs. Mitchell's testimony, is proper in its context.

In the first place no objection was raised in the trial court to any portion of the prosecutor's argument. Nor was the attention of the trial judge directed to either of the objections now made to the charge. When the judge had finished the

charge, defense counsel requested and was granted one addition, immaterial here. Thereafter defense counsel said, "Your Honor, we have nothing else. That is the only point. No exceptions." (R. 77-78.) Only a very grave error could, therefore, be noted by the Court of Appeals. *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 408-412.

The passages complained of in the prosecutor's closing argument were all intended to answer arguments which had just been made by the defense. Defense counsel had called the jury's attention to the contradictory testimony of the two McIntoshes, both Government witnesses, as to the $50 payments (Tr. 749-750, 767-768); he had to a certain extent misrepresented the testimony of petitioner's wife on the same subject (Tr. 751-752); and he had relied heavily on testimony as to mistakes by petitioner's bookkeepers and accountants (Tr. 763-766, 775-777). The prosecutor's argument in reply, considered as a whole (R. 57-65), was not unfair. See *United States* v. *Socony-Vacuum Oil Co., supra,* pp. 237-243.

Petitioner's complaints concerning the trial court's instructions are equally unworthy of further review. While it would probably have been better if the court had refrained from commenting on the quality of Mrs. Mitchell's testimony (see II Wigmore, *Evidence* (3d ed. 1940), Sec. 664), in the absence of objection at the trial this cannot have been such grave error as to require reversal.

This is particularly true in view of the obviously interested character of Mrs. Mitchell's testimony (Tr. 580-594) and in view of the court's express instruction to the jury, at the outset of the charge and immediately after the questioned passage, that they should disregard any expressions of opinion from him and make up their own minds on the facts (R. 65-67, 73). Finally, petitioner's refused instruction (R. 65) was incorrect in postulating a "legal difference" between a taxpayer who has someone else make out his returns and one who makes out his own. The jury were plainly told that petitioner could not be held criminally responsible for inaccuracies in his returns, but must be found to have wilfully filed false returns. (R. 70, 72.)[11]

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[11] Petitioner also urges (Pet. 3, 11, 21-26) that the Court of Appeals has erroneously interpreted Rule 52, *supra*, p. 4, the "harmless error" and "plain error" rule. But the opinion of the court below clearly shows a proper understanding of "plain error" (R. 128-129), and there was no occasion for invocation of "harmless error" since, as has been shown, the rulings to which a proper objection was made in the trial court were not erroneous.

CONCLUSION

The decision of the Court of Appeals is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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HAROLD B. WILLEY, Clerk

No. 622.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

DAVID H. MITCHELL, PETITIONER,

VS.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The purpose of this brief is to comment on the Government's Brief in Opposition, and to supply additional authorities.

The opposition presents four points (B. Opp. 11, 15, 17, 18) which correspond with petitioner's first, second, third, and sixth Reasons for Granting the Writ (Pet. 11, 16, 19, 27); and this reply is limited to such points.

ARGUMENT.

(1) Respecting the burden of producing evidence in Net Worth prosecutions, with particular reference to the Government's failure to make proof of petitioner's gifts, inheritances and loans during the indictment period (Pet. 11-16; B. Opp. 11-15), petitioner notes that the conflict between the Courts of Appeal has been pointed up by the latest decision, *Ford* v. *U. S.*, (C. A. 5) 210 F. 2d 313, wherein it is stated that, in Net Worth prosecutions, "The Government * * * has the further burden * * * of proving that there were no gifts, devices (*sic*), or other nontaxable income * * *," l. c. 315. Contrast this with the following from Government's Brief: "In this case, it is true, the Government did not exclude the possibility that the increases had come from gifts, devises or loans. But it was not incumbent on the Government to exclude all speculative possibilities of innocence" (B. Opp. 12). Conceding again that the Government's position is supported by the controlling rule in the Eighth Circuit as announced in *Schuermann* v. *U. S.*, 174 F. 2d 397, the *Ford* decision, *supra*, supplements petitioner's demonstration in cases cited (Pet. 12-13) that there is a continuing and recurring conflict which should be settled by this Court. See *Remmer* v. *U. S.*, No. 304, 346 U. S. 884, decided March 8, 1954, on other grounds.

Numerous cases cited by the Government (B. Opp. 12-13) are not in point since they relate to *degrees* of proof rather than the *burden* of proof, the latter being the issue raised by petitioner. The Government's Net Worth proof in the cause at bar contains no scintilla of evidence relating to petitioner's gifts and inheritances, so decisions

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as to what constitutes "substantial" evidence can have no application. The inescapable question is which party has the burden of producing evidence of non-taxable receipts. The Government's citation of cases, in seeking to avoid the burden of proof (B. Opp. 14), reveals the thin analogies upon which it relies. See *U. S.* v. *Fleischman*, 339 U. S. 349, including dissenting opinions; compare Pet. 13-15. It is apparent that a serious issue has been raised for this Court's consideration.

In arguing that the Court should let the failure of proof in this case slip by, because not objected to at trial, the Government omits to consider petitioner's arguments on this issue (Pet. 15-16). The Government implies that petitioner admitted at trial that the Government's Net Worth Statement correctly presented petitioner's income during 1945 through 1948, and states that he is now maintaining that there was "no failure at all" in reporting income (B. Opp. 12), neither of which suggestions can find support in the Record or Petition. Petitioner has always conceded certain items negligently omitted from his returns (R. 44). His position here, as below, is that the failure of proof as to gifts, inheritances, and loans is a matter of law rather than an issue for the jury.

The Government further seeks to defer this Court's resolution of the conflict between the Circuits by stating, without Record citation, that there was in this case "an intensive investigation which had revealed no gifts or other non-taxable receipts to account for the increases in petitioner's wealth" (B. Opp. 13). In fairness to petitioner, this unwarranted comment, completely outside the Record, should bear the test of a new trial.

Again, in seeking to distinguish the leading cases favorable to petitioner, the Government states, "In each of

these cases there was an incomplete investigation * * *" (B. Opp. 15). This is no distinction; so far as appears from the present Record, there was no investigation of petitioner's gifts or inheritances. The instant case is a most appropriate one for determining whether, before obtaining an income tax conviction, the Government has the obligation to make such investigation and proof.

(2) Respecting the erroneous admission into evidence and instruction given on petitioner's financial statements containing some $150,000 of market value appreciation which should not have been treated as income (Pet. 6-8, 16-19), the Government continues to advocate the patent error that such inflated market-value statements can be used to "corroborate" a Net Worth Statement, even though, in the Government's language, a net worth computation, "in order to present a true picture of petitioner's income, must necessarily value his assets at cost" (B. Opp. 16). Unless corrected here, the Government has served notice that it will continue to misuse this type of testimony.

The Government's Brief further erroneously states that the acquittal for 1949 and 1950 shows that the financial statements were not prejudicial (B. Opp. 16), despite the obvious explanation that the acquittal was based on the testimony of petitioner's accountant (R. 52-55), unrelated to said financial statements. The Government seeks to link the instructions regarding the financial statements to its own Net Worth Statement rather than to petitioner's financial statements (B. Opp. 16), but a reading of the instructions (R. 71-2) rebuts the suggestion. Finally, the Government claims, "The calculation upon which petitioner now relies (Pet. 18) is fallacious * * *" (B. Opp. 16); but the questioned method of calculation is not petitioner's but the trial court's (R. 71-2). If alleged non-deductible expenditures are to be taken into consid-

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eration in such a calculation, as suggested by the Government, then various deductions should be considered (R. 9), as well as the admittedly unreported income which was explained at trial (R. 52-55, 44) or which the jury found to have been innocently omitted. No precise calculation of income can be made from said financial statements, because market values cannot be reduced to cost on each item and because year-end figures are not available, as required for such a calculation (R. 25); but this does not detract from petitioner's unchallenged demonstration that more than $150,000 of unrealized market value appreciation was erroneously treated as income in this prosecution, and that petitioner was held accountable for said sum as though it were income, to his grave prejudice (Pet. 6-8, 16-19).

(3) Respecting the erroneous admission into evidence of petitioner's tax payments for prior years (Pet. 19-21), the Government states, without explanation, that such payments were "obviously relevant to the establishment of (petitioner's) net worth at the starting point" (B. Opp. 17), although construction of a financial statement out of moneys expended for taxes in prior years remains a baffling procedure. This sleight-of-hand cannot be passed off as "obvious." Nor can the Government properly interpret the testimony of its witness, wherein he stated that such payments had no bearing on the Net Worth Statement (Tr. 391-3), as not including the beginning net worth (B. Opp. 17). This testimony will bear no such strained limitation.

(4) Respecting the serious errors in the prosecutor's closing argument and the trial court's charge (Pet. 9-10, 27-29), extensive additional comment is unnecessary. The Government commendably concedes doubts and probable error concerning the trial court's instruction on Mrs.

Mitchell's alleged "negative" testimony as being "weak testimony as compared with the positive testimony" that disputed payments were actually made (B. Opp. 18, 19; R. 73). The instruction was not merely an expression of opinion on the facts (B. Opp. 20), but was a statement of law. "That kind of testimony is what the courts would call negative testimony, and it is testimony that is not strong" (R. 73). This erroneous legal instruction must have been considered controlling, especially in view of the additional error in argument tending to convince the jury that the court had ruled that the disputed payments were made (R. 64-65).

It should be further noted that no substantial defense is made regarding the specific errors in argument cited by petitioner, the Government relying on a premise, which is seriously disputed, that "The prosecutor's argument * * * considered as a whole (R. 57-65), was not unfair" (B. Opp. 19). No similar attempted defense is made regarding the trial court's instructions (R. 65-77), probably because the general tenor of argument, advocacy, and unbalanced presentation cannot be readily defended. *Spalitto* v. *U. S.*, (C. A. 8) 39 F. 2d 782, 788.

CONCLUSION.

For the foregoing additional reasons, and without waiver of matters presented in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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April, 1954.

No. 622, October Term, 1953. MITCHELL *v.* UNITED STATES. On petition for rehearing. *Per Curiam:* In Nos. 12, 13, 15, 133, 135, 209, 215, and 249 the petitions for certiorari are severally granted. In No. 622, October Term, 1953, the petition for rehearing is granted, the order denying certiorari, 347 U. S. 1012, is vacated, and the petition for writ of certiorari is granted. The judgments are vacated and the cases are remanded to their respective Courts of Appeals for consideration in the light of *Holland* v. *United States*, 348 U. S. 121; *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*,

348 U. S. 147; and *United States* v. *Calderon*, 348 U. S. 160, decided by this Court December 6, 1954.

We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, *supra*, believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the net worth decisions.

MR. JUSTICE BLACK dissents.

Irvin Goldstein for petitioners in No. 12. *Joseph B. Keenan, Alvin O. West* and *John W. Graff* for petitioner in No. 13. *Elden McFarland* for petitioner in No. 15. *Lee S. Jones* and *Helen R. Graft* for petitioner in No. 133. *Peyton Ford, Sumner M. Redstone, H. D. Reed* and *Frank A. Bruno* for petitioner in No. 135. *Llewellyn A. Luce* and *W. M. Nicholson* for petitioner in No. 209. *John J. Hooker* for petitioners in No. 215. *Robert M. Taylor* and *John C. Noonan* for petitioner in No. 249. *Temple W. Seay* for petitioner in No. 622 (October Term, 1953).

Robert L. Stern, then Acting Solicitor General, *Assistant Attorney General Holland* and *Ellis N. Slack* for the United States in Nos. 12, 13 and 15. With them were *Meyer Rothwacks* and *Joseph M. Howard* in No. 12, *Murray L. Schwartz* in No. 13, and *David L. Luce* and *Mr. Howard* in No. 15. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce* and *Joseph M. Howard* for the United States in Nos. 133, 135, 209, 215 and 249.

Reported below: No. 12, 204 F. 2d 74; No. 13, 204 F. 2d 666; No. 15, 206 F. 2d 872; No. 133, 209 F. 2d 260; No. 135, 212 F. 2d 275; No. 209, 213 F. 2d 712; No. 215, 213 F. 2d 805; No. 249, 214 F. 2d 768; No. 622 (October Term, 1953), 208 F. 2d 854.